Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CLAY E. MONROE,
Petitioner,

VS.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When a railroad employee is discharged by his employer in an attempt to eliminate its liability under the FELA, is his state law based wrongful discharge claim preempted by the Railway Labor Act where the claim involves rights and obligations that exist independent of the collective bargaining agreement?

II. When a railroad employee is discharged by his employer in an attempt to eliminate its liability under the FELA, is his cause of action under § 55 of the FELA preempted by the Railway Labor Act where the claim involves rights and obligations that exist independent of the collective bargaining agreement?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appears in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clay E. Monroe, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 115 F.3d 514 and is reproduced in Appendix ("App.") A filed herewith at A-1. The unreported memorandum and order of the district court in this case is reproduced at App. B at A-16.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 10, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent provision of the Federal Employers' Liability Act, 45 U.S.C. §51, et seq. ("FELA") is set forth below:

> § 55. Contract, rule, regulation or device exempting from liability; set-off
>
> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

The pertinent provision of the Railway Labor Act, 45 U.S.C. §151, et seq. (1988) ("RLA") is set forth below:

§ 151a. General Purposes

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing our of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The pertinent provision of the Illinois Workers' Compensation Act, 820 ILCA 305/4(h) (1995), is set forth below:

> (h) It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT OF THE CASE

Petitioner Clay E. Monroe worked as a brakeman for Missouri Pacific Railroad Company and Union Pacific Railroad Company (collectively referred to as the "Railroad") for more than thirteen years. On July 20, 1992, Mr. Monroe sustained extensive injuries while working on a train for the Railroad and was instructed by his treating physician to take a medical leave of absence and to remain off work for a period of time. Ultimately, he was released by his treating physician to return to his job in December, 1992.

In October of 1992, the Railroad was aware of Mr. Monroe's injuries and the probability that he would file a claim for injuries under FELA. In fact, the Railroad assigned a claims agent to work with Mr. Monroe on his case. Mr. Monroe was under medical restrictions to stay off his physically demanding railroad job, but was permitted to do other activities as he had been previously able to perform. Following such instructions, Mr. Monroe helped his father in a store selling satellite dishes, as he had done before his injury, performing lighter work. The Railroad contracted with a private investigating firm to work undercover and spy on Mr. Monroe. From October 18, 1992 until approximately October 26, 1992, the investigators conducted extensive video-taped surveillance of Mr. Monroe. After finding nothing of consequence in the extensive surveillance of Mr. Monroe, the private investigators, with the knowledge and consent of the Railroad, and as the Railroad's agents, then posed as homeowners and, lying about their identity, went to the store of Mr. Monroe's father and ordered a satellite dish from Mr. Monroe, who was helping his father. The investigators secretly filmed Mr. Monroe helping to install the satellite dish. The Railroad then hired a doctor who did not examine Mr. Monroe, did not speak with him, and did not speak with any of his treating doctors. This non-treating, non-examining doctor testified at a disciplinary hearing against Mr. Monroe that he could do Rail-

road work, contradicting Mr. Monroe's treating doctor who said he should not work. The Railroad at no time conducted a physical examination of Mr. Monroe or had a doctor speak to him. Instead, it discharged him on the basis of the opinion of the non-examining doctor, that he had misrepresented the extent of his injuries because he was working in the store. App. C at A-30. Mr. Monroe challenged his dismissal through a grievance procedure set out in the collective bargaining agreement ("CBA") between his labor union and the Railroad. Following a grievance hearing before the Public Law Board, the discharge was found to have been improper, as based on deceit, and Mr. Monroe was ordered reinstated more than three years after the date of his discharge. App. C at A-32.

Thereafter, Mr. Monroe filed a three count Complaint against the Railroad in the Circuit Court of Marion County, Illinois. App. C at A-24. He asserted claims for wrongful discharge in violation of § 55 of the FELA, a separate claim for wrongful discharge in violation of the public policy of the State of Illinois and a claim for punitive damages. The Railroad removed the case to the United States District Court for the Southern District of Illinois and subject matter jurisdiction was conferred pursuant to 28 U.S.C. §1441(a). On July 9, 1996, District Judge Paul E. Riley, Sr., found that the RLA preempted the claim under § 55 of the FELA and dismissed the FELA and Illinois public policy claims for lack of subject matter jurisdiction. App. B at A-16.

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal in a 2-1 order on June 10, 1997. 115 F.3d 514 (App. A at A-1). Although the court explicitly recognized that Mr. Monroe's claims arose from rights and obligations independent of the CBA, it held that the claims were preempted because the issue of the Railroad's motivation behind the termination required interpretation or application of the CBA. *Id.* at 518 (App. A at A-8). The court concluded, therefore, that the claims "involve interpretation of the CBA, and thus they are

minor disputes that can only be adjudicated under the RLA." *Id.* The Court believed that Mr. Monroe's wrongful discharge cause of action under the FELA and Illinois public policy were improper attempts to "artfully plead" CBA claims around the preemptive effect of the RLA. *Id.* at 519 (App. A at A-11). Circuit Judge Fairchild dissented from the opinion, concluding that no foundation supported preemption of Mr. Monroe's state law claim because it existed independent of the CBA and did not involve interpretation of the CBA to any significant extent. *Id.* at 520-521. (App. A at A-12, 15).

Mr. Monroe now seeks the review of this Court. If the Seventh Circuit's decision is allowed to stand, an important precedent of this Court will be contradicted and create confusion in future cases involving injured railroad workers.[1]

---

[1] Already, the Seventh Circuit opinion below is being cited by the Railroad to urge dismissal of other cases where it has discharged injured employees who thereafter file wrongful discharge claims.

REASONS FOR GRANTING THE WRIT

This case involves the scope of federal preemption under the RLA. This Court should grant the writ because the opinion of the Seventh Circuit eliminates legitimate state law wrongful discharge claims as well as claims under § 55 of the FELA, 45 U.S.C. § 55, and is contrary to the decisions of the United States Supreme Court and the courts of appeal. Even where state and federal law claims invoke substantive rights independent of the CBA, the Seventh Circuit's holding necessarily eliminates all state wrongful discharge claims for union employees in the railroad industry because one must refer to the CBA incidentally in each case. This holding directly and explicitly contradicts the holding of this Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and will likely perpetuate unnecessary confusion in future decisions. The decision below has created a serious conflict on the important federal issue of preemption which is clear and irreconcilable; it simply cannot stand.

I.

WHERE A RAILROAD EMPLOYEE IS DISCHARGED BY HIS EMPLOYER IN AN ATTEMPT TO ELIMINATE ITS LIABILITY UNDER THE FELA, THE RAILWAY LABOR ACT DOES NOT PRE-EMPT HIS STATE LAW BASED WRONGFUL DISCHARGE CLAIM BECAUSE THE CLAIM INVOLVES RIGHTS AND OBLIGATIONS THAT EXIST INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT.

A. The Opinion of the Seventh Circuit Defies this Court's Decisions and Has Created an Irreconcilable Conflict With The Other Circuit Courts.

Recently, this Court, set forth the standard for federal preemption under the RLA, holding "that a state-law cause of action is

not pre-empted by the RLA if it involves rights and obligations that exist independent of the collective-bargaining agreement." *Norris*, 512 U.S. at 260. The Court explained that

> where the resolution of a state-law claim *depends* on an interpretation of the [CBA], the claim is pre-empted. . . . [H]owever, . . . purely factual questions about an employee's conduct or an employer's conduct and motives do not requir[e] a court to interpret any term of a [CBA].

Id. at 261-62 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-07 (1988)) (emphasis added).

The RLA preemption standard adopted by the Court was the same as that used in determining preemption under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. *Id.*; *see Lingle*, 486 U.S. at 409-10 (1988) (union employee's state law action based on his retaliatory discharge for filing an Illinois workers' compensation claim held not preempted because the state law remedy was "independent" of the CBA, in that resolution of the state-law claim did not require construing the CBA).

In *Norris*, a union airline mechanic was terminated for refusing to sign a maintenance record falsely certifying that a repair had been performed. He asserted claims for discharge in violation of public policy and of Hawaii's Whistleblower Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69 (1988). Because the retaliatory discharge claim under Hawaii state law implicated purely factual questions regarding the employee's discharge and the employer's motive, an interpretation of the CBA was not required to adjudicate the claim and, accordingly, the Court held that the state law claim was not preempted by the RLA. *Norris*. 512 U.S. at 266. The Court explained that, "Wholly apart from any provision of the CBA, [an employer] ha[s] a state-law obligation not to fire [its employee] in violation of public policy or in retaliation . . . and [t]he parties' obligations

under the RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve [the employer] of this duty." *Id.* at 258. Hence, *Norris* stands for the proposition that where the CBA is not the "only source" of the right not to be discharged wrongfully and the elements of the claim are purely factual and not dependent upon interpretation of the CBA, there is no preemption of a state law claim. *Id.* at 261-63.

Following *Norris*, several circuit courts held that state law based retaliatory discharge claims are not preempted by the RLA or LMRA even if they require proof of the conduct and motives of the parties. *See, e.g., Shafii v. British Airways*, 83 F.3d 566 (2nd Cir. 1996) (action for retaliatory discharge not preempted by RLA); *Martin Marietta Corp. v. Maryland Commission on Human Relations*, 38 F.3d 1392 (4th Cir. 1994) (state law retaliatory discharge claim not preempted by LMRA); *Jimeno v. Mobile Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) (wrongful termination claim based on physical disability discrimination state law not preempted by LMRA because of purely factual inquiry notwithstanding several pertinent CBA provisions). Indeed, it is difficult to imagine a scenario involving a claim of wrongful discharge in which motivation of the employee would not be examined. Similarly, several circuit courts have held, citing *Norris*, that other state law claims requiring proof of the conduct and motives of the employer and employee are not preempted. *See, e.g., Gay v. Carlson*, 60 F.3d 83 (2nd Cir. 1995) (recognizing that its previous expansive view of preemption was altered by *Norris*, holding claims for defamation, prima facie tort and conspiracy not preempted by RLA); *Hirras v. National Railroad Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995) (reversing its contrary decision made prior to *Norris*, holding that emotional distress claims could be determined under state law standards wholly apart from CBA and were not preempted by RLA); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994) (state law handicap discrimination claim not pre-

empted because CBA was not the only source of right to avoid wrongful termination).

The Seventh Circuit's holding below was contrary to the teaching of this Court in *Norris* and contrary to the decisions of the other circuits, when it held that the possible reference to a CBA in connection with a justification defense gives rise to preemption. *See Norris*, 512 U.S. at 265-66; *Gay*, 60 F.3d at 88. *See also Lingle*, 486 U.S. at 413 n.12. (the bare fact that a CBA will be *consulted* in the course of state-law litigation plainly does not require the claim to be extinguished.) Clearly, where an employer attempts to justify the termination by following the terms of the CBA, the use of the CBA may actually serve as a mere pretext to engage in wrongful discharge. *Martin Marietta Corp.*, 38 F.3d at 1403. The claim is not preempted if the *source* of the protection against wrongful discharged is state tort law, not the CBA. *Id. Norris* and its progeny establish that, where the meaning of CBA terms is not the subject of dispute, the bare fact that a CBA will be consulted in the course of state law litigation plainly does not mean that the claim "depends" on interpretation of the CBA so as to extinguish the claim. *Norris*, 512 U.S. at 262-63, 266. Thus, when the Seventh Circuit held that "[a]ny analysis of Monroe's wrongful discharge claims necessarily requires interpretation of the CBA in order to determine the validity of his arguments regarding the Railroad's retaliatory intent", it completely disregarded this Court's holdings in *Norris* and *Lingle* and ignored the decisions of its sister circuits. It also ensured that, unless reversed, *every* wrongful discharge claim within the Seventh Circuit will encounter the argument that it is preempted because it necessarily requires interpretation of the CBA.

The effect of the Seventh Circuit's holding is that, although a state law wrongful discharge claim is independent of the CBA, the mere fact that it involves incidental interpretation or application of a CBA is sufficient to preempt the claim. Certainly, *every*

state law wrongful discharge claim could be said to require reference to the CBA in order to determine lost wages. This loose standard flatly conflicts with the decisions of the Second, Fourth, Fifth, Eighth, and Ninth Circuits, which properly effectuated the narrowed scope of RLA preemption pronounced by this Court in *Norris*. If allowed to stand, this decision will undoubtedly lead to conflicting decisions on virtually identical facts. Accordingly, this Court should reaffirm the standard set forth in *Norris* that a state law claim is not preempted by the RLA, if it exists independent of the CBA.

B. Congress Did Not Intend to Preempt Substantive State Law Rights Which Are Independent of A CBA.

The overreaching preemption standard applied by the lower court is contrary to the narrow standard intended by Congress. Whether the RLA preempts a state law establishing a cause of action is a question of congressional intent. *Norris*, 512 U.S. at 252. Federal preemption of state law "should not be lightly inferred in this [labor] area, since the establishment of labor standards falls within the traditional police powers of the State." *Id.* at 252, 259 n.6. (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). The principles of federalism counsel that, in preemption cases generally, this court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

The purpose of Congress in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, T. & S.F. R. Co. v. Buell*, 480 U.S. 557, 562 (1987). To effectuate this purpose, the Act mandates arbitration for "major" and "minor" disputes. *Norris*, 512 U.S. at 252. Minor disputes contemplated

by § 151a of the RLA are those that are created or defined by, and which may be conclusively resolved by interpreting the existing CBA. *Id.* at 258. The lower court incorrectly determined that Mr. Monroe's claim was a minor dispute. However, state law rights existing independent of the collective bargaining agreement are not minor disputes. *Id.* at 260; *Lingle*, 486 U.S. at 407. Such a state law right need not be statutory, but may be a right based on articulated public policy that exists independent of the CBA. *Lingle*, 486 U.S. at 407. This Court has clearly and expressly held, however, that state law rights existing independent of a contract are not preempted:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 [of the LMRA] or other provisions of the federal labor law. . . . Nor is there any suggestions that Congress . . . wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . Clearly, [Congress did] not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Allis-Chalmers v. Lueck, 471 U.S. 202, 211-12 (1985)

This Court has consistently reaffirmed the principle that federal law cannot be read broadly to preempt non-negotiable rights conferred on employees by state law. *See, e.g., Lingle*, 486 U.S. at 409 (§ 301 preemption merely ensures that federal law will be the bases for interpreting CBA's and says nothing about the substantive rights provided by a state); *Livadas v. Bradshaw*, 512 U.S. 124, 114 S.Ct. 2068, 2078 (1994) (rejecting claim that

employee's state law right to receive a penalty payment from employer was preempted because penalty was tied to wages, which were determined by the CBA). When the meaning of contract terms is not the subject of dispute, the mere fact that a CBA may be consulted in the course of state law litigation plainly does not require the claim to be extinguished. *Livadas*, 114 S.Ct. at 2078 (citing *Lingle*, 486 U.S. at 413 n. 12).

Nothing in the RLA provides substantive rules that govern matters such as violating state or federal law, recompense for work place injuries, illegal employment discrimination, or recourse against wrongful discharges (other than discharges in retaliation for exercise of those rights created by the RLA itself, *see* § 152, Third). Generally, these matters are governed by statutory and common law minimum labor standards, and rights to be free of discrimination in the work place. Congress has never made "clear and manifest" any intention to preempt state minimum labor standards laws generally, or, state wrongful discharge laws in particular or, for that matter, to do anything to interfere with these laws. *See Norris* 512 U.S. at 252, 259 n.6. There is nothing in the "plain language" of the RLA that restricts states from acting affirmatively to protect employees in the industries covered by the statute. The rationale used by the court below would never permit a union worker, wrongfully discharged to recover the damages authorized by state law. To extrapolate such a broad intent to preempt by congress is simply not warranted.

Moreover, the mere reference to, or tangential involvement of, a CBA in resolving an independent state law claim does necessitate preemption. *Id.* at 260. To be preempted, the claim must be the product of a breach of a collective bargaining agreement. As long as the cause of action is not founded upon a breach of the collective bargaining agreement, reference to the collective bargaining agreement in resolving the claim does not preempt the claim. *Lingle*, 486 U.S. at 412-413. The lower

court's finding of preemption is based solely on its erroneous belief that it is necessary to refer to the CBA to determine the issue of retaliatory intent. Its reasoning would necessarily require a finding of preemption in every case involving a union worker whose wages are determined by a collective bargaining agreement. Obviously, every wrongful discharge claim of any type for a union worker may require application of, or reference to, the CBA's wage levels in determining the damages. This flawed rationale could be used to preempt a civil rights claim under Title VII or any other claim of discrimination. However, an independent cause of action specifically is not preempted, despite its reliance upon the collective bargaining agreement to determine wages, benefits lost, and damages. *Id.* Similarly, an independent state law cause of action is not preempted when the meaning of the CBA is not the subject of dispute. *Livadas*, 114 S.Ct. at 2078.

Finally, Congress did not intend that the mere existence of a potential CBA-based remedy could deprive an employee of independent state law remedies. The Public Law Board cannot grant consequential tort damages or punitive damages, facts which necessarily mean there is no forum in which Mr. Monroe can recover full compensation for wrongful discharge. Moreover, if the Public Law Board would refuse to grant back pay, an employee will be deprived of his lost earnings although found to have been wrongfully discharged. Further, the RLA does not preempt if the same factual inquiry is involved under both a state law claim and a claim for breach of the CBA. *Lingle*, 486 U.S. at 408-09. Parallel remedies available under both the CBA and state law may be pursued simultaneously without preemption. *Id.* at 409. Thus, it is irrelevant that Mr. Monroe pursued a remedy under the CBA, where a breach of the CBA was found, because the meaning of the CBA is not the subject of dispute, nor does it depend on the interpretation of the CBA.

There simply is no suggestion that Congress, in adopting the RLA intended to give the substantive provisions of private agreements the force of federal law, ousting any tangentially inconsistent state law and, clearly, the RLA does not grant the parties to a CBA the ability to contract for what is illegal under state law. Thus, Mr. Monroe's CBA cannot permit the Railroad to terminate him in violation of Illinois state law. In that his wrongful discharge action is predicated on the violation of Illinois state law, not a breach of the CBA, Congress did not intend for the RLA to preempt his action. *See Monroe*, 115 F.3d at 520-21 (Fairchild, J., dissenting) (App. A at A-12 - 15).

C. The Seventh Circuit's Decision Abrogated A Valid Claim By Monroe Which the State of Illinois Has Long Allowed.

The court in the instant case failed to follow the precedent established by this Court in *Norris* and *Lingle*, effectively denying Mr. Monroe a forum in which to recover full compensation for the damages rendered by the Railroad's wrongful discharge. A careful examination of the facts and claims pleaded by Mr. Monroe in his complaint clearly establish that the RLA does not preempt his right to recover these damages.

As noted, this Court consistently has recognized that a state law wrongful discharge claim is not preempted, because it exists independent of the CBA, in that the essential inquiry is purely factual: whether the employee was discharged and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of rights under state law. *Norris*, 512 U.S. at 262-63 (citing *Lingle*, 486 U.S. at 407). These issues can be determined without reference to the CBA. *See, e.g., id.* at 266 (wrongful discharge claim for violation of state public policy determinable without reference to CBA); *Lingle*, 486 U.S. at 407 (same claim, based on interference with the exercise of rights

under the Illinois worker's compensation law, not preempted). Like the plaintiff in *Lingle*, Mr. Monroe premised his claim on the substantive right to be free from wrongful discharge derived from the public policy of the State of Illinois.

Illinois public policy and a long line of cases forbid an employer from doing anything to interfere with, restrain, or coerce an employee's right to receive full compensation for on-the-job-injuries. *See Lingle*, 486 U.S. at 419; *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) (tort of wrongful discharge necessary to enforce policy of the Illinois Workers' Compensation Act); 820 ILCS 305/4(h) (setting forth public policy proscribing discrimination in retaliation of exercise of workers' compensation rights); *Hinthorn v. Roland's of Bloomington*, 519 N.E.2d 909 (Ill. 1988) (allowing action for discharge for mere possibility of filing a claim). Illinois also has adopted as its state policy, federal policies, and provided a wrongful discharge cause of action based on federal public policy similar to that set forth in § 55 of the FELA. *See, e.g., Howard v. Zack Company*, 637 N.E.2d 1183 (Ill. App. 1994) (employee can maintain a cause of action when fired for failure to violate the policies of the Nuclear Regulatory Commission); *Russ v. Pension Consultants Company*, 538 N.E.2d 693 (Ill. App. 1989) (employee can maintain a cause of action when fired for refusal to violate the policy of federal tax law). In effect, federal public policy is adopted as Illinois public policy giving rise to a state cause of action for its violation. The state has a legitimate right to adopt a policy making discharges in violation of § 55 of the FELA invalid. However, application of the rationale by the court below would have necessarily required dismissing both *Norris* and *Lingle*.

The lower court properly noted that, "Monroe correctly asserts that the *source* of his claims are independent of the CBA because they are found in the FELA and in Illinois public policy." 115 F.3d at 518 (App. A at A-15). As such, a finding of no preemption was mandated. *Norris*, 512 U.S. at 266.

Nonetheless, the lower court proceeded to hold incorrectly that "Monroe's claims do not involve purely factual questions, and they do require interpretation of the CBA . . . in order to determine the validity of his arguments regarding the Railroad's retaliatory intent . . . and thus they are minor disputes that can only be adjudicated under the RLA." 115 F.3d at 518 (App. A at A-8). The court improperly disregarded the holdings in *Norris* and *Lingle* that the issue of retaliatory intent involves "purely factual questions . . . [that] do not require a court to interpret any term of a collective-bargaining agreement." *Norris*, 512 U.S. at 266. The court's reliance on *Kollar v. United Transportation Union*, 83 F.3d 124, 126 (5th Cir. 1996) (fraud claim regarding misrepresentation of seniority rights provided in the CBA) and *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996) (claims based on rights derived solely from CBA of union to protect members from harassment during strike) is misplaced because *Kollar* limited its holding to fraud claims based on rights provided in the CBA and *Fry* was the result of the court's finding that no state law obligations supported the employee's claim, "wholly apart from any provision of the CBA."

Moreover, Mr. Monroe's claims are determinable without reference to the CBA, are not a product of the CBA, and are therefore independent claims. The facts of this case are closely analogous to those in *Norris*. Here, Mr. Monroe was allegedly discharged to destroy his claim for lost wages in his FELA action. Here, as there, either the employer discharged the employee intending to defeat his injury claim or it did not, a purely factual issue. Like Mr. Monroe, the plaintiff in *Norris* initially sought relief through the grievance process of the RLA and, finding it ineffective or incomplete, brought an action for wrongful discharge based on a violation of public policy. *Norris*, 512 U.S. at 249-50. Inasmuch as the policy of the State of Illinois protects workers' rights to pursue claims for on-the-job-injuries without interference, *Lingle*, 486 U.S. at 410, it also protects Mr. Monroe from being discharged for asserting his rights under FELA.

Mr. Monroe's claim of wrongful discharge is not the product of a breach of the CBA and is determinable on a purely factual basis. As the lower court properly noted, there is no dispute that Mr. Monroe was terminated. Thus, the sole issue is whether the Railroad's motivation for the discharge was to interfere with the exercise of Monroe's rights under Illinois law and the FELA; and no interpretation of the CBA is required for this limited purpose. *Norris*, 512 U.S. at 266; *Lingle*, 486 U.S. at 407. "Whatever the parties' rights and duties under their collective bargaining agreement, they could not possibly have negotiated infringement of [plaintiff's] state law right to be free from" tortious behavior. *Hayden v. Reickerd*, 957 F.2d 1506, 1509 (9th Cir. 1992). The Railroad's duty not to wrongfully discharge its employee is not created by the CBA, but by the legislature and courts of Illinois which offer the tort of wrongful discharge as a minimum substantive guarantee to all Illinois residents against discharge which violates public policy. *Lingle*, 486 U.S. at 406-407. No violation of a CBA is required to establish a claim of wrongful discharge, just as none is required if the basis for the discharge is race discrimination. Similarly, no right granted in a CBA offered as a defense warrants preemption. *Id.* at 407. Thus, the Railroad's claim that it was justified by the CBA in terminating Mr. Monroe does not convert the state law based wrongful discharge action into a labor grievance preempted by the RLA.

In reaching its holding, the Seventh Circuit relied on its previous decision in *Bielicke v. Terminal R.R. Ass'n*, 30 F.3d 877 (7th Cir. 1994). In *Bielicke*, the court held that the RLA preempted a railroad union laborer's FELA claim which alleged wrongful discharge and abuse of investigatory powers in an attempt to discourage pursuit of FELA actions, but did not include a state law claim independent of the CBA. *See Monroe*, 115 F.3d at 520-21 (Fairchild, J., dissenting) (App. A at A-14 - 15). The decision, although issued one month after *Norris*, did not apply, much less acknowledge, the preemption standard pronounced in *Norris*. Although the majority in the decision

below recognized this as a "legitimate concern" and purported to "tread lightly in discussing *Bielicke*" in the instant case, it nonetheless relied heavily on its holding there because it had not been overruled explicitly. *Id.* at 517 n.2 (App. A at A-6). However, *Bielicke* improperly found RLA preemption merely because the CBA would have to be consulted to determine the Railroad's justification in investigating and discharging the employee. *Bielicke*, 30 F.3d at 878. This analysis was explicitly overruled in *Norris*, 512 U.S. at 260-62 and, therefore, *Bielicke* is not good law and the Seventh Circuit's reliance on it was misplaced in light of *Norris*.

Accordingly, since the state law obligations owed by the Railroad exist "wholly apart from any provision of the CBA," Mr. Monroe's claim is "independent" of the CBA and, therefore, not preempted by the RLA, notwithstanding the fact that the CBA may be referenced in determining the amount of lost wage damages. The erroneous holding of the Seventh Circuit to the contrary cannot stand.

II.

WHERE A RAILROAD EMPLOYEE IS DISCHARGED BY HIS EMPLOYER IN AN ATTEMPT TO ELIMINATE ITS LIABILITY UNDER THE FELA, THE RAILWAY LABOR ACT DOES NOT PREEMPT HIS CAUSE OF ACTION UNDER § 55 OF THE FELA, BECAUSE THE CLAIM INVOLVES RIGHTS AND OBLIGATIONS THAT EXIST INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT.

This Court should grant the writ, in addition to the reasons set forth above in Argument I, because the Seventh Circuit's holding, that the RLA preempts a wrongful discharge claim under § 55 of the FELA, conflicts with this Court's decision in *Atchison, T. & S.F. R. Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, the Court held that the RLA did not preempt an injured railroad worker's FELA injury claim, because the rights derived from the

FELA were independent of the CBA, notwithstanding the fact that the conduct causing the injury may have been subject to arbitration under the CBA. *Id.* at 564-65. The Court rejected the railroad's argument that the RLA preempted the claim merely because the alleged injury resulted from conduct that was subject to the CBA, finding it "inconceivable" that Congress intended to limit an injured employee's relief to a narrow labor grievance and deny recovery under the FELA. *Id.* at 565. *Buell* was cited approvingly by this Court in both *Norris*, 512 U.S. at 258-59, and *Lingle*, 486 U.S. at 412, in support of the rule that the RLA does not preempt claims arising from rights independent of the CBA.

Just as an FELA claim for on-the-job injuries is independent of the CBA, a claim under § 55 of the FELA for wrongful discharge is independent of the CBA where it is based on the Railroad's termination of its injured worker in an attempt to prevent him from fully exercising his right to collect damages in the underlying injury claim. "No part of the [FELA] was repealed by the [RLA]." *Buell*, 480 U.S. at 566-67. Accordingly, no claim under the FELA can be thrown out on the ground that it is really a minor dispute under the RLA. *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 96 (7th Cir. 1988). The FELA is liberally construed and, "not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its CBA, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board." *Buell*, 480 U.S. at 565. Here, Mr. Monroe has a need for a forum in which to recover all of his damages resulting from the Railroad's unlawful termination of him.[2]

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[2] The RLA administrative machinery cannot provide a remedy to an employee unable to work due to injury who is then fired. The employee cannot be given back pay in a Public Law Board action for any period of time for which he is physically unable to work.

In this case, Mr. Monroe asserts a claim for wrongful discharge in violation of §55 of the FELA, which prohibits "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any* liability created by this chapter." The use of termination for the purpose of deterring a claim under FELA is just such a device. The policy of the FELA, *i.e.*, to provide compensation to railroad workers who are injured on the job, would be fatally undercut without such a ruling. Railroad workers would be discouraged from making such claims by the fear of being fired and be denied the wages which they would have made while working for the railroad, but for the injury for which they seek compensation. This use of claims oriented discipline by railroads under the protective guise of labor management is not novel and has often been criticized by the federal courts as an attempt to significantly reduce the nature and amount of damages for which they are liable. *See, e.g., Smith v. Union Pacific Railroad Co.*, 878 F.Supp. 171, 173 (D. Colo. 1995) (finding no RLA preemption of court's authority over civil discovery to limit Railroad's use of back-to-work physical and ensuing disciplinary proceedings as a means of defeating injury claims); *Vicary v. Consolidated Rail Corp.*, 942 F.Supp. 1146, 1150 (D. Ohio 1996) (railroad's effort to terminate employees to defeat economic loss claim "circumvent[s] the rules [and] threatens the integrity of the judicial process").

It was the economic power of the major railroads which led Congress to adopt § 55 of the FELA as a protection for the right to sue for injuries on the job. Eliminating this protection by virtue of preemption, in an industry which, unlike others, is using governmentally granted rights of way and which again is consolidating economic power, will allow an emasculation of the right to sue through termination of injured employees who have claims. This result is precisely what occurred here. If a claim to protect these rights is extinguished under the guise of preemption, as the Seventh Circuit held, then the Railroad would be able

to exempt itself from liability by a preemptory firing of Mr. Monroe. Such a firing arguably eliminates the Railroad's liability for Mr. Monroe's lost wages in his injury claim, effectively eliminating much of his remedy under the FELA. This type of activity is the essence of what Congress sought to avoid through § 55 of the FELA.

Determination of whether the RLA preempts a claim under § 55 of the FELA is governed by the same analysis as set forth by the Court in *Norris*, 512 U.S. at 259 n. 6. Hence, where the claim involves rights and obligations that exist independent of the CBA, it is not preempted. *Id.* at 260. There is no greater rationale for suggesting that the RLA preempts the FELA than there is for saying the FELA preempts the RLA. To suggest that the RLA preempts the FELA is merely to contend that one federal law carries greater authority than another. This Court rejected such an approach in *Buell, supra*. Section 55 provides "minimum substantive guarantees to individual workers" which Congress did not intend to preempt when it enacted the RLA. *See Buell*, 480 U.S. at 565. This Court has accepted that "FELA jurisprudence gleans guidance from common-law developments." *Id.* at 568 (citing *Urie v. Thompson*, 337 U.S. 163, 174 (1949)). Accordingly, just as Illinois' public policy protects employees from discharge in retaliation of the filing of a worker's compensation claim, § 55 provides a source of rights wholly independent of the CBA to protect the railroad employee, whose injury claim must be pursued exclusively under the FELA, from similar retaliatory discharge. *See Norris*, 512 U.S. at 266; *Lingle*, 486 U.S. at 407.

Based on the reasoning set forth above, the lower court erred when it held that the RLA preempted Mr. Monroe's claim under § 55 of the FELA and, in so doing, created a conflict with *Buell* which is clear and irreconcilable.

CONCLUSION

For the reasons stated, the Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES
COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,

DATED JUNE 10, 1997

Clay E. MONROE,
Plaintiff-Appellant,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and Union Pacific Railroad Company,
Defendants-Appellees.

No. 96-2862

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 7, 1997.

Decided June 10, 1997.

Employee sued railroad for wrongful discharge. The United States District Court for the Southern District of Illinois, Paul E. Riley, J., dismissed for lack of subject matter jurisdiction. Employee appealed. The Court of Appeals, Kanne, Circuit Judge, held that analysis of employee's claims required interpretation of collective bargaining agreement to determine validity of employee's arguments regarding railroad's retaliatory intent, and thus claims were preempted by Railway Labor Act (RLA).

Affirmed.

Fairchild, Circuit Judge, filed opinion dissenting in part.

Jerome J. Schlichter (argued), Nannette A. Baker, Fairview Heights, IL, for Plaintiff-Appellant.

Kurt E. Reitz (argued), Mary S. Juen, Thompson Coburn, Belleville, IL, David A. Dick, St. Louis, MO, for Defendants-Appellees.

Before FAIRCHILD, CUMMINGS, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

This case calls upon us to resolve whether the district court properly dismissed Clay Monroe's wrongful discharge claims, which he brought pursuant to the Federal Employers Liability Act ("FELA") and Illinois public policy. We agree with the district court that it lacked subject matter jurisdiction to adjudicate Monroe's claims as they were preempted by the Railway Labor Act ("RLA"). Thus, we affirm the dismissal of Monroe's action.

I. HISTORY

Clay Monroe worked for thirteen years as a brakeman for the Missouri Pacific Railroad and the Union Pacific Railroad (collectively, "the Railroad"). Monroe was injured at work on July 20, 1992, and his doctor advised him to take a medical leave of absence. In October of that year, the Railroad hired a private investigator to conduct surveillance on Monroe as he had not yet returned to work due to his alleged injuries and physical incapacity. The Railroad's investigators discovered that Monroe was working at his father's business, where he was selling and installing satellite television systems. At one point, the investigators ordered a satellite dish from Monroe while posing as homeowners and then videotaped Monroe while he helped install the dish. In December 1992, Monroe's doctor permitted him to return to work for the Railroad.

The Railroad subsequently commenced a collective bargaining agreement ("CBA") hearing regarding the propriety of Monroe's conduct while on medical leave. Evidence at the

hearing included the videotape of Monroe installing the satellite system, as well as testimony from a doctor who opined that Monroe could do physical railroad work. This doctor, however, neither spoke with Monroe nor physically examined him. On December 17, 1992, the Railroad discharged Monroe for misrepresenting his physical condition.

Monroe subsequently filed four separate legal proceedings against the Railroad challenging his dismissal: 1) he filed a CBA labor grievance based on his alleged wrongful termination[1]; 2) he brought a civil suit in the Madison County Circuit Court (Illinois) based on the Railroad's private investigation of him, including claims of fraud, conspiracy, and similar torts; 3) he filed another civil suit in the St. Louis Circuit Court (Missouri) pursuant to the FELA, seeking damages for the personal injuries he sustained on July 20, 1992; and 4) he brought the present action.

The case before us involves a three-count complaint that Monroe filed on March 19, 1996 in the Circuit Court of Marion County, Illinois. Count I attempts to state a claim under the FELA, 45 U.S.C. § 55, alleging that the Railroad wrongfully discharged Monroe in an attempt to defeat any personal injury claims Monroe might have against the Railroad under the FELA. Count II asserts that the Railroad's wrongful discharge of Monroe violated Illinois public policy because it attempted to prevent Monroe from fully exercising his right to collect damages for his work-related injuries. Count III claims that the Railroad's alleged misconduct was willful and wanton, and is essentially a prayer for punitive damages.

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[1] On November 22, 1996, an arbitration panel in the Public Law Board No. 5314 reached a conclusion regarding Monroe's CBA labor grievance. It ruled that the Railroad's disciplinary investigation against Monroe was not fair and impartial and ordered Monroe "reinstated to service with all rights unimpaired and with backpay."

The Railroad removed the case to the United States District Court for the Southern District of Illinois on April 26, 1996, and it filed a Motion to Dismiss based on the federal court's lack of subject matter jurisdiction (Fed.R.Civ.P. 12(b)(1)) and Monroe's failure to state a claim upon which relief could be granted (Fed.R.Civ.P. 12(b)(6)). On July 9, 1996, the district court granted the Railroad's motion to dismiss based on lack of subject matter jurisdiction, finding that the RLA preempted Monroe's FELA and Illinois public policy claims.

II. ANALYSIS

[1] We must decide whether the district court correctly found that the RLA preempts Monroe's wrongful discharge claims under the FELA and under Illinois public policy. We review *de novo* a district court's grant of a motion to dismiss for subject matter jurisdiction. *Underwood v. Venango River Corp.*, 995 F.2d 677, 679 (7th Cir. 1993), *overruled on other grounds, Westbrook v. Sky Chefs, Inc.*, 35 F.3d 315 (7th Cir. 1994).

[2] Whether a federal law preempts another law that establishes a cause of action is a question of congressional intent. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 251-52, 114 S.Ct. 2239, 2243, 129 L.Ed.2d 203 (1994). The arguably preemptive federal law in this case — the RLA provides a comprehensive framework for resolving labor disputes, including a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. *Id.; see* 44 U.S.C. § 151a; *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 562, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563 (1987). The first class of disputes — major disputes — seeks to create contractual rights; and the second class — minor disputes — seeks to enforce these rights. *See Hawaiian Airlines* at 252-54, 114 S.Ct. at 2244. The Railroad contends that this case involves a minor dispute.

Minor disputes grow "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules,

or working conditions," 45 U.S.C. § 151a, and they "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation," *Hawaiian Airlines*, at 252-54, 114 S.Ct. at 2244 (quoting *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 636-37, 1 L.Ed.2d 622 (1957)). All minor disputes must be adjudicated under RLA mechanisms, which include an employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer. *Id.*; *see* 44 U.S.C. § 184. If Monroe's FELA and Illinois public policy claims are "minor disputes," they are, of course, preempted by the RLA.

In *Hawaiian Airlines*, the Supreme Court addressed the preemption of minor disputes under the RLA. The Court held that not all grievances or employment-related disputes are considered "minor disputes" for RLA preemption purposes. *Hawaiian Airlines*, at 252-54, 114 S.Ct. at 2244. Rather, "'grievances,' like disputes over 'the interpretation of application' of CBAs, refers to disagreements over how to give effect to the bargained-for agreement." *Id. Hawaiian Airlines* ultimately found that the RLA did not preempt the plaintiff's state-law tort actions — which were based on the state's public policy and its whistleblower statute — because those claims necessitated a purely factual inquiry into the retaliatory motivations of the employer and did not require interpretation of the relevant CBA. *Id.* at 266, 114 S.Ct. at 2251.

In reaching this conclusion, *Hawaiian Airlines* embraced the analysis from a prior preemption case, *Lingle v. Norge Div. of Magic Chef, Inc..*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). *See Hawaiian Airlines*, at 262-64, 114 S.Ct. at 2249 ("[W]e conclude that *Lingle* provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA pre-emption."). In *Lingle*, the Court held that the plaintiff's state-law retaliatory

discharge claim was not preempted by the Labor Management Relations Act ("LMRA") because it turned on "purely factual questions" regarding the employer's motivation behind the discharge and it did not require interpretation of any CBA term. *Lingle*, 486 U.S. at 407, 108 S.Ct. at 1822. In reaching this decision, the *Lingle* Court recognized that dispute resolution pursuant to a CBA and the adjudication of a separate state-law claim might require different tribunals to address the same set of facts, *id.* at 408-09, 108 S.Ct. at 1882-83; nonetheless, the Court ruled that a state claim is independent of a CBA for preemption purposes "as long as the state-law claim can be resolved without interpreting the agreement itself," *id.* at 410, 108 S.Ct. at 1883.

We have had the opportunity to decide RLA preemption cases since *Hawaiian Airlines* adopted the *Lingle* standard. In *Bielicke v. Terminal R.R. Ass'n*, 80 F.3d at 877 (7th Cir. 1994) — a case strikingly similar to the one before us — we held that the RLA preempted the plaintiffs' FELA claims, which alleged that the railroad wrongfully discharged plaintiffs and improperly abused its investigatory powers in an attempt to discourage plaintiffs from pursuing other FELA actions to recover dames for their job-related personal injuries.[2] Significantly, we reasoned that

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[2] Monroe argues that we should not consider *Bielicke* because that decision did not discuss *Hawaiian Airlines*. In making this argument, Monroe suggests that the *Bielicke* court may not have considered *Hawaiian Airlines* because the Supreme Court decided *Hawaiian Airlines* only one month before we decided *Bielicke*, and apparently neither party in *Bielicke* requested that we reconsider our decision in light of the recent *Hawaiian Airlines* decision.

Plaintiff raises legitimate concerns, and we therefore tread lightly in discussing *Bielicke*. Nonetheless, we find the *Bielicke* decision to be valid and helpful here — it was decided *after Hawaiian Airlines*, it has not been overruled, and its facts are nearly identical to those before us. Moreover, although *Bielicke* did not discuss *Hawaiian Airlines*, its holding comports with the Supreme Court's reasoning in both *Hawaiian Airlines* and *Lingle*. IN all three cases a key component in the preemption analysis remains whether a plaintiff's claims require a court to interpret a CBA.

"[o]ne cannot determine whether Terminal Railroad conducted the investigations for legitimate purposes under the collective bargaining agreements or if they abused the investigation procedures allowed by the collective bargaining agreements without focusing the case on the collective bargaining agreements themselves." *Id.* at 878.

More recently, we held that the RLA did not preempt a plaintiff's retaliatory discharge action filed under the Illinois Workers' Compensation Act. *See Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316 (7th Cir. 1994). In *Sky Chefs*, we found that plaintiff's cause of action was not a minor dispute (and thus not preempted) because it involved "rights and obligations that exist independent of the collective bargaining agreement." *Id.* at 318 (quoting *Hawaiian Airlines*, at 258-60, 114 S.Ct. at 2247. In reaching this conclusion, we based our decision solely on the fact that the CBA did not provide the "only source" of plaintiff's rights, and we had no occasion to address whether the adjudication of plaintiff's state-law claim would involve interpretation or application of a CBA. *See id.* at 317-18.

[3] In this case, the Railroad argues that Monroe's claims are preempted because they are minor disputes that require interpretation of the CBA. Monroe, in contrast, maintains that his claims are not minor disputes because they are not based on the rights given by the CBA, but rather are "independently based" on rights conferred by the FELA and the State of Illinois. The gravamen of Monroe's claim is that the Railroad terminated his employment in order to interfere with his potential FELA personal injury claim, and that both the FELA and Illinois public policy prohibit such action by the Railroad. Monroe also maintains that the adjudication of his complaint requires no interpretation of the CBA because the only questions are "whether the employee was discharged . . . and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of rights" protected by the FELA and Illinois public policy. *See Hawaiian Airlines*, at 260-62, 114 S.Ct. at 2248.

Like the district court, we agree that an uncritical glance at Monroe's claims seems to compel a finding of no preemption in light of the Supreme Court's *Hawaiian Airlines* and our *Sky Chefs* decisions. We need not analyze any part of the CBA to determine that the Railroad actually terminated Monroe. Moreover, Monroe correctly asserts that the *source* of his claims is independent of the CBA because they are found in the FELA and in Illinois public policy.[3] Monroe's argument falters, however, when he asserts that the Railroad's motivation behind his termination involves a purely factual question that requires no interpretation or application of the CBA.

Unlike the claims in *Hawaiian Airlines* and *Lingle,* Monroe's claims do not involve purely factual questions, and they do require interpretation of the CBA. Any analysis of Monroe's wrongful discharge claims necessarily requires interpretation of the CBA in order to determine the validity of his arguments regarding the Railroad's retaliatory intent.

First of all, Monroe's complaint alleges that the Railroad failed to avail itself of its right to compel him to undergo a physical examination of it contested his medical condition. The CBA provides the Railroad with its right to compel such an examination. Second, a court must apply and interpret the standards regarding an employee's physical condition — which are implied terms of the CBA — when analyzing Monroe's claim of pretextual discharge. *See Fry v. Airline Pilots Ass'n, Int'l,* 88 F.3d 831, 836 (10th Cir. 1996) (A "plaintiff's claims are minor disputes if they depend not only on a right found in the CBAs, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working

[3] This assumes, of course, that Monroe has stated claims upon which relief may be granted — a premise that the Railroad vigorously contests and of which we are highly skeptical. Nonetheless, we need not address whether Monroe has stated valid claims under Fed.R.Civ.P. 12(b)(6) due to our finding of preemption.

relationship."). Third, Monroe questions the propriety of his disciplinary hearing as well as the sufficiency of the evidence proffered at that hearing by objecting to the testimony of a doctor who never examined him. This hearing was conducted pursuant to the CBA and the RLA, thereby necessitating the court's interpretation of that agreement and those laws. Fourth, Monroe's claims involve pat and future wages, benefits, and promotions — all of which are determined by the CBA.[4] Finally, in one of Monroe's three other legal actions, Monroe himself argued that his claim against the Railroad for unmeritorious discipline (*i.e.*, his dismissal) must be analyzed under the CBA and the RLA.[5] In light of these facts, we must conclude that Monroe's FELA and Illinois public policy claims involve interpretation of the CBA, and thus they are minor disputes that can only be adjudicated under the RLA.

Monroe asserts that *Hawaiian Airlines* specifically rejected the notion that a CBA must be consulted in order to determine the propriety of a discharge. But the only "interpretation" question put forth in *Hawaiian Airlines* was whether the employee was,

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[4] While this reason alone would not compel a finding that Monroe's claims involve application or interpretation of a CBA, it does aid our analysis. *Cf. Livadas v. Bradshaw*, 512 U.S. 107, 124-26, 114 S.Ct. 20568, 2079, 129 L.Ed.2d 93 (1994) ("[T]he mere need to 'look to' the collective-bargaining agreement for damage computation is no reason to hold the state law claim defeated. . . ."); *Lingle*, 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12.

[5] The Railroad asserts that Monroe should be judicially estopped from arguing that his wrongful discharge claim is not a minor dispute because of Monroe's ""blatant contradiction" in positions regarding whether his rights must be assessed under the CBA and the RLA. Because we find that the RLA preempts Monroe's claims, we need not reach the Railroad's judicial estoppel argument. We note, however, that *Hawaiian Airlines* apparently permits a plaintiff to maintain both an RLA action before a Public Law Board and a wrongful discharge action before a state or federal court so long as the state or federal court claim does not require interpretation or application of a CBA. *Hawaiian Airlines*, at 258-64, 114 S.Ct. at 2247-49.

in fact, discharged. *Hawaiian Airlines*, at 266, 114 S.Ct. at 2251. The Court rejected the employer's argument, reasoning that the determination of whether the employee was discharged was a "purely factual question." *Id.* In this case, there is no dispute about the purely factual question of whether Monroe was discharged — he clearly was terminated by the Railroad. Rather, the factual matters at issue here involve the propriety of Monroe's discharge.

Moreover, contrary to Monroe's assertions, we can easily harmonize our decision today with our decision in *Sky Chefs*. *Sky Chefs* relied upon only one aspect of the RLA preemption standard set out in *Hawaiian Airlines* and *Lingle* —whether a CBA provided the only source for a plaintiff's wrongful discharge claim. *Sky Chefs*, 35 F.3d at 318. Here, we have the occasion to address a second facet of the *Hawaiian Airlines-Lingle* standard — whether the adjudication of a plaintiff's claim requires interpretation of a CBA. Our *Sky Chefs* decision should not be narrowly construed to eliminate this latter, and crucial, element of the *Hawaiian Airlines-Lingle* preemption standard.

Our finding of preemption here also complies with the recent application of *Hawaiian Airlines* by two other circuits. In *Kollar v. United Transportation Union*, 88 F.3d 1244 (5th Cir. 1996), the Fifth Circuit found that the RLA preempted plaintiffs' fraud claim because it involved the interpretation of plaintiffs' seniority, which was controlled by a CBA and other modifying agreements. *Id.* at 126. Significantly, the court found that even though the plaintiffs couched their claim in terms of fraud — a source independent of the CBA — the resolution of that claim required interpretation of the CBA: "To prove the falsity of the representations, Plaintiffs would have to show that the relevant seniority provisions of the CBA, the transfer agreement, and modifying letter agreement, differ from the representations made by the Union. This requires interpretation of the CBA left appropriately to procedures established under the RLA." *Id.*

Similarly, the Tenth Circuit in *Fry* found that several plaintiffs' federal and state claims were preempted because they could not "be understood with reference to the various CBAs." *Fry*, 88 F.3d at 836. That court first noted that the threshold question for RLA preemption after both *Hawaiian Airlines* and *Lingle* remained "whether resolution of the federal and state law claims of the plaintiffs requires interpretation or application of the CBAs." *Id.* at 836. Then it determined that plaintiffs' claims were minor disputes, and thus preempted, because the district court needed to review the relevant CBAs in order to determine the appropriateness of the employer's motive in discharging the striking pilots, *Id.* at 836-37.

Without question, the Supreme Court's *Hawaiian Airlines* decision makes this a close case (or at least a much closer one than before *Hawaiian Airlines* was decided). Moreover, we recognize "that not all cases which tangentially touch collective bargaining agreements call for . . . preemption." *Loewen Group Int'l, Inc.. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995); *accord Livadas v. Bradshaw*, 512 U.S. 107, 122-26 & n. 18, 114 S.Ct. 2068, 2078-79 & n. 18, 129 L.Ed.2d 93 (1994). The factual particularities of Monroe's complaint, however, require an interpretation of the CBA and thus mandate our finding of preemption.

Simply put, we believe that the district court correctly determined that what Monroe "attempts to do in *this* lawsuit is to litigate his labor-related claims *under* FELA," and that a "course of action is *not* permitted by *Hawaiian Airlines*." *Monroe v. Missouri Pacific R.R. and Union Pacific R.R.*, No 96-CV-0351-PER, slip op. at 6 (S.D.Ill. July 9, 1996). We cannot allow Monroe to "artfully plead" himself around the preemptive effect of the RLA by framing his CBA claims as wrongful discharge causes of action under the FELA and Illinois public policy. *See Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 97 (7th Cir. 1988) ("A claim does not arise under the FELA merely because

the plaintiff names that statute in his complaint and omits (accidentally or by design) the claim's true source."). *See generally Bielicke*, 30 F.3d 877. As such, we Affirm the district court's decision dismissing Monroe's claims for lack of subject matter jurisdiction.

FAIRCHILD, Circuit Judge, dissenting in part.

With all respect I do not agree that Monroe's asserted state law claim involves interpretation of the collective bargaining agreement to any significant extent. If the claim has any merit under Illinois law, it exists "independent of the collective bargaining agreement." *Hawaiian Airlines, Inc.. v. Norris*, 512 U.S. 246, 264-66, 114 S.Ct. 2239, 2250, 129 L.Ed.2d 203 (1994).

That leads to other questions, not addressed by the majority.

I. Removal

Monroe brought his action in an Illinois court. Defendant Railroad Companies removed ti to federal district court. 28 U.S.C. § 1445(a) provides that a civil action in any state court against a railroad arising under the FELA may not be removed to any district court cf the United States.

In Count I Monroe invoked only the FELA and claimed:

> 10. The sole reason for the hearing and termination of Plaintiff's employment was to defeat any claim Plaintiff might have for personal injury against the Defendants in an action under the FELA.
>
> 11. Such wrongful discharge was illegal in that it violated the 45 U.S.C. § 55 in that it is a device designed to prevent plaintiff from enforcing his rights under the FELA.

In Count II Monroe invoked both the public policy of the FELA and the State of Illinois, alleging that the "discharge violated the public policy of the FELA and the State of Illinois

in that it attempted to prevent him from fully exercising his right to collect damages for injuries on the job."

Monroe's theory, sound or no, is that the discharge "arguably eliminates the railroad's liability for Mr. Monroe's lost wages in his injury claim, effectively eliminating much of his remedy under the FELA." Appellant's Brief, pp. 35-36.

There may be two reasons why 28 U.S.C. § 1445(a) does not require remand to state court. (1) Waiver. Years ago it was held that the antecedent of 28 U.S.C. § 1445(a) did not limit the jurisdiction of a district court over an FELA case removed to it, but conferred a personal privilege which may be waived. *Carpenter v. Baltimore &O.R. Co.*, 109 F.2d 375, 379 (6th Cir. 1940). Not all courts have agreed, but a majority of those considering the question appear to have done so. Steve Kline, *Waiver of Right of Non-Removability of Jones Act Claims: Lirette v. N.L. Sperry Sun, Ind.*, 12 Tul. Mar. L.J. 397, 401 (Spring 1988). (The Jones Act adopted relevant portions of the FELA). (2) The part of Count II which invokes state law may be sufficiently independent from claims arising under the FELA that § 1445(a) would not prevent removal.

II. Claims are not predicated on breach of contract.

Both Count I and II allege that the discharge was wrongful because of defendants' purpose to defeat or impair plaintiff's rights under the FELA. There is no allegation that it was wrongful because defendants breached some term of the collective bargaining agreement. It is true that paragraph 9 of both counts alleged that defendants had a right to a physical examination of plaintiff, but failed to exercise it. Presumably the collective bargaining agreement was the source of the right. Whatever evidentiary bearing failure to exercise this right might have in proving that the discharge was motivated as alleged, and therefore wrongful, the defendants' failure to exercise their contract right was not an element of the claim. The majority said (*see*

supra p. 518) that "Monroe questions the propriety of his disciplinary hearing as well as the sufficiency of the evidence," but there is nothing in the complaint challenging the disciplinary hearing.

The majority cites *Bielicke v. Terminal R.R. Ass'n,* 30 F.3d 877 (7th Cir. 1994) and *Hammond v. Terminal R.R. Ass'n of St. Louis,* 848 F.2d 95 (7th Cir. 1988). In neither was a state-law claim asserted. *Bielicke* was argued April 12, 1994, and the opinion was issued July 26, 1994. *Hawaiian Airlines Inc. v. Norris,* 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) was decided June 20, 1994, and was not mentioned in *Bielicke.* On their face, the two decisions are not inconsistent. The *Bielicke* plaintiffs alleged that the railroad's investigation and discharge of them violated the FELA, while *Hawaiian* dealt directly with state law claims. The *Bielicke* panel concluded that

> One cannot determine whether Terminal Railroad conducted the investigations for legitimate purposes under the collective bargaining agarrements or if they abused the investigation procedures allowed by the collective bargaining agreements . . . without focusing the case on the collective bargaining agreements themselves. . . . [T]hese claims are directly connected with the collective bargaining agreements and thus the claim arises under the RLA, not the FELA.

30 F.3d at 878. Monroe's state law claim requires no such focus.

In *Hammond,* a pre-*Hawaiian* decision, this court held that a claim which nominally invoked the FELA did not arise under the FELA, but under the RLA. The court said that the complaint as it stood at the time of removal "complained only about the railway's having filed allegedly unmeritorious disciplinary charges; it was a pure breach of contract claim. . . ." 848 F.2d at 97.

Neither *Bielicke* nor *Hammond* supports the proposition that Monroe's state-law claim is a breach of contract claim, governed by the RLA.

III. The validity of Monroe's state-law claim.

Monroe's state-law claim relies on *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978), recognizing the tort of wrongful discharge where an employee was discharged because she filed a worker's compensation claim. "Because of the similarity of purpose between FELA and the Illinois worker's compensation statute, no principled distinction can be made which will disallow a finding of wrongful discharge where the Illinois courts have recognized the tort in the context of worker's compensation." Appellant's Brief p. 28.

There will be difficulties in deciding that issue, but I am convinced that that is the question this case presents to this court. As already indicated, I think there is no foundation for a holding that Monroe's state law claim is preempted.

APPENDIX B

MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS,
DATED JULY 9, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLIONIS

NO: 96-CV-0351-PER

CLAY E. MONROE,
Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants.

MEMORANDUM AND ORDER

[Filed: July 9, 1996]
STUART J. O'HARE
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

RILEY, District Judge:

I. Introduction

Clay Monroe worked for 13 years as a brakeman for Missouri Pacific Railroad Company and Union Pacific Railroad (collectively, "the Railroad"). On July 20, 1992 Monroe was injured while working on a train near Dexter, Missouri. Monroe's physician advised him to take a medical leave of absence. In October 1992, while Monroe was still subject to work restrictions, the Railroad hired a private investigator to conduct surveil-

lance of Monroe. The investigation revealed that Monroe was working in his father's satellite dish business, installing satellite television systems while he was supposed to be on medical leave from Railroad work. In December 1992, Monroe was released to return to work. A disciplinary hearing was held, and on December 17, 1992, Monroe was discharged from his job with the Railroad for misrepresenting his physical condition.

Monroe filed four legal proceedings challenging his dismissal: (1) a suit in Madison County Circuit Court for fraud, deceit and conspiracy; (2) a suit in St. Louis City Circuit Court under the Federal Employers' Liability Act (45 U.S.C. § 1, *et seq.*) seeking damages for the July 1992 personal injuries he sustained; (3) a grievance procedure under an applicaboe collective bargaining agreement ("CBA"); and (4) a suit in Marion County Circuit Court alleging violations of FELA and Illinois law prohibiting wrongful termination and/or retaliatory discharge. In April 1996, the Marion County wrongful discharge lawsuit was removed to this Court. The Railroad now has moved to dismiss this action for lack of subject matter jurisdication and failure to state a claim upon which relief can be granted.

II. Analysis

The gist of the Railroad's motion is that the claims raised in this lawsuit are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq*. Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557, 562 (1987). To accomplish this goal, the RLA set up a mandatory arbitral mechanism for the "prompt and orderly settlement" of two classes of disputes. *Hawaiian Airlines, Inc. v. Norris,* 114 S.Ct. 2239, 2243 (1994).

Major disputes" relate to the formation of collective bargaining agreements or efforts to secure them. *Id.* at 2244, *citing*

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 302 (1989). "Minor disputes" arise from the interpretation or application of CBAs and cover such things as rates of pay, rules and working conditions. *See* 45 U.S.C. § 151a; 153. Minor disputes involve controversies over the meaning of application of an existing CBA in a particular fact situation. *Hawaiian Airlines* at 2244. Minor disputes also include disagreements which implicate a "course and practice" of an employer. *See Leu v. Norfolk & Western Railway Co.,* 820 F.2d 825, 829 (7th Cir. 1987).

Stated more simply, major disputes seek to create contractual rights, whereas minor disputes seek to enforce them. *Hawaiian Airlines* at 2244, *citing Consolidated Rail,* 491 U.S. at 302. If a dispute is "minor," it must be resolved *only* through the RLA's mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions. 45 U.S.C. § 184. Where the RLA preempts such disputes, the federal courts lack subject matter jurisdiction to adjudicate them. *See, e.g., Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 324 (1972).

The question here is whether the claims advanced in *this* lawsuit are "minor disputes" preempted by the RLA. This necessitates a closer look at the claims in Monroe's complaint to determine whether Monroe seeks resolution of a disagreement with the Railroad over how to "give effect" to the bargained-for agreement already applicable to his employment. *Hawaiian Airlines* at 2244.

Count I of Monroe's complaint attempts to state c claim pursuant to 45 U.S.C. § 55, a provision of FELA, Count II attempts to state a claim under Illinois law for wrongful termination or retaliatory discharge. Count III is a prayer for punitive damages. Monroe argues that the rights he asserts herein are not based on the collective bargaining agreement but rather are

"independently based" on rights conferred by the State of Illinois and by FELA. A state law cause of action is *not* preempted by the RLA if it involves rights and obligations that exist independent of the CBA. *Hawaiian Airlines* at 2247.

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 405-07 (1988), provides an example of a claim *not* preempted by the RLA. In *Lingle*, an employee covered by a labor agreement was fired for filing a false workers' compensation claim. after pursuing a grievance under the CBA, the employee filed a complaint in state court alleging discharge for exercising rights under Illinois workers' compensation laws. The trial judge found the state law claim preempted, but the United States Supreme Court disagreed. The Supreme Court recognized that when the resolution of a state law claim *depends on* an interpretation of a CBA, the claim *is* preempted. But *Lingle* was not such a case. Instead, that case, involved "purely factual" questions and did *not* require interpretation of any terms of the CBA. Thus, the state law retaliatory discharge claim in *Lingle* was *not* preempted by the RLA.

At first blush, the facts of this case appear similar to those in *Lingle*. But closer examination reveals that the claims advanced by Monroe (unlike those in *Lingle*) "depend on" interpretation and application of the CBA. Monroe seeks to recover past and future wages, benefits and promotions. Clearly, these items are determined by the CBA. He alleges that the Railroad decided to forego its right to compel him to undergo a physical examination. This allegation necessitates interpretation and application of the CBA provisions, company rules and "course and practice" in this area. Monroe's complaint questions the propriety of the disciplinary hearing. That hearing was conducted pursuant to the CBA and the RLA.

The specific factual allegations of Monroe's complaint, and the relief sought therein, reveal that Monroe seeks resolution of

a disagreement with the Railroad that *relates directly* to the CBA. In *Bielicke v. Terminal Railroad Association,* 30 F.3d 877 (7th Cir. 1994), the Seventh Circuit confronted a nearly identical situation. Four employees sued under FELA alleging that Terminal Railroad, their employer, conducted employee investigations for the purpose of deterring the employees from pursuing FELA suits in violation of 45 U.S.C. § 55 — the precise section relied upon by Monroe in this lawsuit. Judge William D. Stiehl held that the employees' claims directly related to their CBA and were preempted by the RLA. The employee-plaintiffs appealed. The Seventh Circuit affirmed, noting (at 878, emph. added):

> One cannot determine whether Terminal Railroad conducted the investigations for legitimate purposes under the collective bargaining agreements or if they abused the investigation procedures allowed by the collective bargaining agreements . . . without focusing on the collective bargaining agreements themselves. *As such, the proper vehicle for pursuing the claim is the Railway Labor Act (RLA).*

The Seventh Circuit further explained: "We have previously held that a claim against an employer who allegedly files unmeritorious disciplinary charges relates directly to the collective bargaining agreement and thus arises under the RLA, not the FELA. *Hammond v. Terminal R.R. Ass'n of St. Louis,* 848 F.2d 95, 97 (7th Cir. 1988), *cert. denied,* 489 U.S. 1032." *Id.* (emph. added).

The holding in *Bielicke* applies with equal force here. Monroe alleges that the Railroad improperly investigated him, conducted improper disciplinary hearings, and wrongfully discharged him. Those very allegations were made in *Bielicke,* and the Seventh Circuit found that the claims were "directly connected with the collective bargaining agreements" and arose "under the RLA, not the FELA" *Id.* at 878. The same conclusion must be reached here.

Monroe argues, however, that the principles relied on in *Bielicke* "have been overruled by *Hawaiian Airlines*." (Plaintiff's response, Doc. 14 at p. 10.) This argument fails for several reasons. For one thing, the Seventh Circuit handed down its opinion in *Bielicke* five weeks *after* the Supreme Court's decision in *Hawaiian Airlines*. *Hawaiian Airlines* cannot be said to have "overruled" a decision that came *later*. And a thorough cite check confirms that *Bielicke* still stands as "good law."

Moreover, *Hawaiian Airlines* (the case which Monroe would have this Court follow) does not rescue Monroe's claims from RLA preemption. In *Hawaiian Airlines*, the U.S. Supreme Court emphasized that rights derived from FELA are independent of rights under a CBA, a proposition not disputed by this Court:

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion.

Hawaiian Airlines at 2247, *quoting Atchison*, 480 U.S. at 564-65.

This principle is not contravened by this Court's ruing. Monroe has the right to pursue his claim of improper discipline through the grievance proceedings and RLA mechanisms. He also has the right to pursue a *separate* personal injury suit based on the Railroad's allegedly negligent conduct under FELA. (In fact, he has filed two proceedings other than this lawsuit doing each of those things.) But what he attempts to do in *this* lawsuit is to litigate his labor-related claims *under FELA*. That course of action is *not* permitted by *Hawaiian Airlines*.

Monroe argues that the RLA does not preempt causes of action to enforce rights that are separate and independent from the CBA. *Hawaiian Airlines* at 2246. Again, this proposition is true, but Monroe's suit does not seek to enforce such "separate" rights. Monroe's complaint attempts to state a claim under § 55 of FELA which prohibits any "rule, regulation or device" which allows any carrier to exempt itself from FELA liability. Although § 51 of FELA permits damages to be recovered for *personal injuries* caused by an employing railroad's negligence, § 55 of FELA does *not* permit damages to be recovered for a carrier's *improper discipline* or discharge of an employee. And that is precisely the wrong for which Monroe seeks a remedy in this action.

Again, the Court reaches the inescapable conclusion that, as in *Bielicke*, the allegations made and the relief sought in Monroe's complaint *necessarily* involve interpretation and application of the collective bargaining agreement applicable to Monroe and the Railroad. Thus, Seventh Circuit precedent requires this Court to find that Monroe's claims in *this* suit arise under the RLA (not FELA). Accordingly, Monroe's claims are preempted by the RLA.

The Court is cognizant of the fact that Monroe has pending in St. Louis City Circuit Court another FELA suit seeking to recover for the Railroad's negligent conduct in causing his personal injuries in July 1992. The Court's ruling herein does nothing to negatively impact that FELA suit for damages. Nor should this ruling adversely affect Monroe's grievance proceeding under which he has now apparently secured (via an interim ruling) the right to return to work.

III. Conclusion

Because this Court lacks subject matter jurisdiction over Plaintiff Clay Monroe's claims herein, the Court GRANTS Defendants' motion to dismiss for lack of subject matter juris-

diction (Doc. 9-1) and dismisses this case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1). This dismissal renders MOOT the alternative motion to dismiss Plaintiff's claims for failure to state a cause of action upon which relief can be granted (Doc. 9-2).

IT IS SO ORDERED.

DATED this 9th day of July, 1996.

/s/ PAUL E. RILEY
PAUL E. RILEY
United States District Judge

APPENDIX C

COMPLAINT FILED IN THE CIRCUIT COURT OF THE COUNTY OF MARION, STATE OF ILLINOIS

Case Number

CLAY E. MONROE,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants.

Serve Defendants at: Missouri Pacific Railroad Company
CT Corporation System Registered Agent
208 South LaSalle Street
Chicago, Illinois 60604

Union Pacific Railroad Company
CT Corporation System, Registered Agent
208 South LaSalle Street
Chicago, Illinois 60604

COMPLAINT

COUNT I

COMES NOW Plaintiff, Clay E. Monroe, by and through his attorneys, Schlichter, Bogard & Denton, and complaining against Defendants, Missouri Pacific Railroad Company and Union Pacific Railroad company, states as follows:

1. Plaintiff is and at all times relevant herein was a resident of Salem, Illinois.

2. On or about July 20, 1992, Plaintiff was employed by the Defendants as a brakeman.

3. At all times mentioned herein, the Defendants were and are corporations organized and existing under the law and did and do business in the County of Marion and State of Illinois.

4. At all times mentioned herein and pertinent hereto, the Defendants were railroad corporations engaged in interstate transportation and commerce and Plaintiff was at the time of his injuries working in furtherance of Defendants' interstate commerce.

5. On the aforesaid date and place, Plaintiff was caused to sustain injuries while in the performance of his duties.

6. Plaintiff filled out an injury report following his injury, a necessary step in a claim for injuries.

7. As a result of sustaining injuries while working for Defendants, Plaintiff had a cause of action arising under the provisions to Title 45 of the United States Code, commonly known as the Federal Employers Liability Act, Sections 50-61.

8. Plaintiff reported his injury and sought medical treatment and in compliance with the instructions of his doctor remained out of railroad service on a medical leave of absence.

9. Defendants, though they had a right to require Plaintiff to undergo a physical examination if they contested his medical condition, did not do so. They fired Plaintiff by letter dated December 17, 1992, a copy which is attached hereto as Exhibit A and incorporated herein by reference. The alleged purpose of the aforementioned discharge was because Plaintiff had allegedly misrepresented physical condition, while in fact here was merely following his doctor's orders to stay off railroad work.

10. The sole reason for the hearing and termination of Plaintiff's employment was to defeat ay claim Plaintiff might have for personal injury against the Defendants in an action under the FELA.

11. Such wrongful discharge was illegal in that it violated the 45 U.S.C. § 55 in that it is a device designed to prevent plaintiff from enforcing his rights under the FELA.

12. This discharge was found to be improper by a federally appointed "neutral" as part of the Public Law Board on February 29, 1996. Such decision is attached hereto, marked Exhibit B, and incorporated herein by reference.

13. As a direct and proximate result of the foregoing wrongful termination, Plaintiff has been caused to undergo severe pain and suffering; he has suffered psychological and emotional injury, mental anguish and anxiety and will continue to suffer psychological and emotional injury, mental anguish and anxiety in the future; he has lost wages and benefits and promotions and will continue to lose wages and benefits in the future; he has suffered a loss of earning capacity and will have an employment record that is tarnished by a termination and a long absence from employment, all to his damage in an amount in excess of Fifteen Thousand Dollars ($15,000.00).

WHEREFORE Plaintiff Clay E. Monroe prays that this Court:

Order that Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company pay compensatory damages to Plaintiff who was the subject of this wrongful termination in an amount in excess of Fifteen Thousand Dollars ($15,000.00); and

Grant Plaintiff his costs and such additional or alternative relief as is just and equitable.

COUNT II

COMES NOW Plaintiff, Clay E. Monroe, by and through his attorneys, Schlichter, Bogard & Denton, and complaining against Defendants, Missouri Pacific Railroad Company and Union Pacific Railroad company, states as follows:

1. Plaintiff is and at all times relevant herein was a resident of Salem, Illinois.

2. On or about July 20, 1992, Plaintiff was employed by the Defendants as a brakeman.

3. At all times mentioned herein, the Defendants were and are corporations organized and existing under the law and did and do business in the County of Marion and State of Illinois.

4. At all times mentioned herein and pertinent hereto, the Defendants were railroad corporations engaged in interstate transportation and commerce and Plaintiff was at the time of his injuries working in furtherance of Defendants' interstate commerce.

5. On the aforesaid date and place, Plaintiff was caused to sustain injuries while in the performance of his duties.

6. Plaintiff filled out an injury report following his injury, a necessary step in a claim for injuries.

7. As a result of sustaining injuries while working for Defendants, Plaintiff had a cause of action arising under the provisions to Title 45 of the United States Code, commonly known as the Federal Employers Liability Act, Sections 50-61.

8. Plaintiff reported his injury and sought medical treatment and in compliance with the instructions of his doctor remained out of railroad service on a medical leave of absence.

9. Defendants, though they had a right to require Plaintiff to undergo a physical examination if they contested his medical condition, did not do so. They fired Plaintiff by letter dated December 17, 1992, a copy which is attached hereto as Exhibit A and incorporated herein by reference. The alleged purpose of the aforementioned discharge was because Plaintiff had allegedly misrepresented physical condition, while in fact here was merely following his doctor's orders to stay off railroad work.

10. The sole reason for the hearing and termination of Plaintiff's employment was to defeat ay claim Plaintiff might have for personal injury against the Defendants in an action under the FELA.

11. That such wrongful discharge violated the public policy of the FELA and the State of Illinois in that it attempted to prevent him from fully exercising his right to collect damages for injuries on the job.

12. This discharge was found to be improper by a federally appointed "neutral" as part of the Public Law Board on February 29, 1996. Such decision is attached hereto, marked Exhibit B, and incorporated herein by reference.

13. As a direct and proximate result of the foregoing wrongful termination, Plaintiff has been caused to undergo severe pain and suffering; he has suffered psychological and emotional injury, mental anguish and anxiety and will continue to suffer psychological and emotional injury, mental anguish and anxiety in the future; he has lost wages and benefits and promotions and will continue to lose wages and benefits in the future; he has suffered a loss of earning capacity and will have an employment record that is tarnished by a termination and a long absence from employment, all to his damage in an amount in excess of Fifteen Thousand Dollars ($15,000.00).

WHEREFORE Plaintiff Clay E. Monroe prays that this Court:

Order that Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company pay compensatory damages to Plaintiff who was the subject of this wrongful termination in an amount in excess of Fifteen Thousand Dollars ($15,000.00); and

Grant Plaintiff his costs and such additional or alternative relief as is just and equitable.

COUNT III

COMES NOW Plaintiff, Clay E. Monroe, by and through his attorneys, Schlichter, Bogard & Denton, and complaining against Defendants, Missouri Pacific Railroad Company and Union Pacific Railroad Company, states as follows:

1. Plaintiff realleges and incorporates by reference herein Paragraphs 1 through 13 of Count II, as though fully set forth in Count II.

2. The aforementioned acts were part of a pattern of using termination to eliminate employees' rights to fully recover for injuries and were willful, wanton, and malicious; it is part of a pattern carried out by Defendants using discipline and discharges to eliminate full recovery for on-the-job injuries.

WHEREFORE Plaintiff Clay E. Monroe prays that this Court:

Order that Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company pay punitive damages to Plaintiff in an amount in excess of Fifteen Thousand Dollars ($15,000.00); and

Grant Plaintiff his costs and such additional or alternative relief as its just and equitable.

SCHLICHTER, BOGARD & DENTON

/s/ Jerome J. Schlichter
JEROME J. SCHLICHTER
#02488115
333 SALEM PLACE, SUITE 260
FAIRVIEW HEIGHTS, ILLINOIS
62208

ATTORNEYS FOR PLAINTIFF

PLAINTIFF DEMANDS TRIAL BY JURY
CLERK TO ISSUE SUMMONSES ACCORDING TO LAW

UNION PACIFIC RAILROAD COMPANY

OFFICE OF SUPERINTENDENT

ST. LOUIS DIVISION

CERTIFIED MAIL - (P 394 790 705)
RETURN RECEIPT REQUESTED

ST. LOUIS, MO. - DECEMBER 17, 1992

DISCIPLINE NOTICE NO. S9201091

MR. C. E. MONROE, BRAKEMAN/CONDUCTOR
137 HICKORY LANE
SALEM, IL 82881

DEAR MR. MONROE:

YOU ARE HEREBY ADVISED THAT YOUR RECORD HAS THIS DATE BEEN MARKED DISMISSED ACCOUNT SINCE YOUR REPORTED PERSONAL INJURY OF JULY 20, 1992, YOU HAVE MISREPRESENTED AND/OR EXAGGERATED THE EXTENT OF YOUR INJURIES AND YOUR ALLEGED INABILITY TO PERFORM SERVICE AS A BRAKEMAN/CONDUCTOR WHILE ENGAGED IN OUTSIDE EMPLOYMENT OF A PHYSICALLY STRENUOUS NATURE. THIS IS IN VIOLATION OF GENERAL RULES A, B, 607 (4) AND 621 OF THE GENERAL CODE OF OPERATING RULES, EFFECTIVE OCTOBER 29, 1989.

YOUR RECORD NOW STANDS: DISMISSED FROM UNION PACIFIC RAILROAD.

_____

R. W. SCHREIBER - SUPERINTENDENT

(SIGN THIS COUPON, DETACH AND RETURN TO SUPERINTENDENT PROMPTLY)

. . . . . .

MR. R. W. SCHREIBER, SUPT.
ROOM 1612 - ST. LOUIS, MO

I HEREBY ACKNOWLEDGE RECEIPT OF DISCIPLINE NOTICE NO. S9201091_____

DATED: _____

SS# 328-50-8161
C. E. MONROE, BRKMN/CNDCTR

CC: B. L. BOYLES, LOC CHRM UTU-SALEM . . .
(P 394 790 706)
W. E. NARO, DIR LAB REL - RM 332 - OMAHA
R. V. DURRANT, MTO
PERS REC FILE
CMS

THIS FORM IS TO BE WRITTEN IN DUPLICATE, ORIGINAL SENT TO EMPLOYEE WHOSE RECORD IS ASSESSED WITH DISCIPLINE.

EMPLOYEE RECEIVING THIS NOTICE WILL SIGN COUPON, DETACH AND RETURN TO SUPT., WHO WILL PASTE IT TO HIS COPY OF THE NOTICE FILED WITH PERSONAL RECORD

PLAINTIFF'S EXHIBIT A

PUBLIC LAW BOARD NO. 5314
CASE NO. 3
INTERIM AWARD

STATEMENT OF CLAIM:

"Claim of Trainman C. E. Monroe for reinstatement to service with seniority and benefits unimpaired. Claim includes pay for all lost time commencing December 17, 1992 and thereafter until restored to full service."

DECISION:

After study of the entire record, Mr. Monroe shall be reinstated to service with all rights unimpaired. The matter of back pay, if any, shall be addressed when the Board issues its decision.

D. P. Twomey
Arbitrator

February 29, 1996

PLAINTIFF'S EXHIBIT B

Supreme Court
FILED
OCT 9 1997

No. 97-410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLAY MONROE,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Railway Labor Act preempt a retaliatory discharge claim where the adjudication of the claim would require the court to interpret and apply the terms of the applicable collective bargaining agreement?

II. Does the Railway Labor Act preempt a retaliatory discharge claim where the adjudication of the claim would require the court to interpret and apply the terms of the applicable collective bargaining agreement and the plaintiff has not invoked an existing right independent of the collective bargaining agreement to the relief requested?

LIST OF PARTIES

Respondents agree with Petitioner Monroe's summary of the parties involved.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Missouri Pacific Railroad Company and Union Pacific Railroad Company respectfully request this Court to deny Petitioner Clay Monroe's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATUTES INVOLVED

45 U.S.C.§ 151a.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 153(i) First

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such

disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C.§ 56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

STATEMENT OF THE CASE

Monroe claims that he suffered physical injuries while working for Union Pacific[1] on July 20, 1992. Monroe remained off work after his alleged injury. In October 1992, while Monroe was still on a leave of absence from Union Pacific because of his

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[1] Missouri Pacific Railroad Company has merged into Union Pacific Railroad Company; Missouri Pacific is no longer a corporate entity. Thus, Union Pacific and Missouri Pacific assert identical interests, and this Brief will refer only to Union Pacific.

alleged injuries and physical incapacity, Union Pacific hired a private investigator to conduct surveillance on Monroe. The surveillance revealed that Monroe was working, actively installing satellite television systems, even though he was on medical leave from Union Pacific because of his alleged physical incapacity. The persons conducting surveillance videotaped Monroe engaging in the physical labor of installing a satellite system.

On December 8, 1992, Union Pacific held a formal disciplinary hearing and investigation pursuant to the provisions of the collective bargaining agreement ("CBA") which governed the conditions of Monroe's employment. At this hearing, the videotape was introduced into evidence, as was the testimony of a doctor who opined that Monroe was capable of performing the various tasks necessary for his brakeman's position. The doctor concluded that Monroe had misrepresented his physical condition to Union Pacific. By letter dated December 17, 1992, and as a result of the disciplinary hearing and investigation held on December 8, Union Pacific discharged Monroe from its employment for violating certain company rules by misrepresenting his physical condition and his inability to work.

On October 5, 1993, over nine months after his termination, Monroe filed a lawsuit in the Circuit Court of the City of St. Louis, Missouri, pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. In that suit (Monroe I), Monroe sought damages for personal injuries allegedly suffered on July 20, 1992. This was the first of four actions Monroe has prosecuted against his employer.

On October 12, 1994, Monroe filed a second suit in the Circuit Court of Madison County, Illinois (Monroe II), claiming that Union Pacific, the private investigation service which videotaped him, and several of its employees committed fraud, civil conspiracy and other similar state law torts which proximately caused his termination. The general basis of these claims is that

the defendants fraudulently represented that they were purchasing a television satellite antennae, when their real purpose was to conduct surveillance on Monroe, resulting in his termination. The compensatory and punitive damages Monroe seeks arise from his termination. This suit is currently pending in the Circuit Court for Jefferson County, Illinois

In addition to the civil suits described above, Monroe challenged his dismissal through a grievance and appeals filed pursuant to the procedures set forth in the CBA and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (Monroe III). In this proceeding, and as his Complaint in this action states, Public Law Board No. 5314, an arbitral entity existent pursuant to the RLA, issued an interim order directing that Monroe be reinstated to return to work. Petitioner's Appendix ("P.A."), at A-26, A-28, A-32. Public Law Board No. 5314 later awarded Monroe full backpay of $177,154.70 to compensate him for all wages lost from the date of his December 17, 1992 termination until his reinstatement to work. App., A-3 to A-6. The reinstatement was "with seniority and benefits unimpaired." P.A., A-32. Monroe's attorney in this action, Mr. Jerome Schlichter, prosecuted the grievance on Monroe's behalf. App., A-8. Mr. Schlichter appeared for oral argument before the Public Law Board on January 18, 1996, and filed a brief in support of Monroe's grievance which argued that the Public Law Board must determine Monroe's claim for retaliatory discharge. App., A-8.

Monroe filed the present action (Monroe IV), his fourth legal proceeding against Union Pacific, on March 19, 1996 in the Circuit Court of Marion County, Illinois. Count I of the Complaint at issue attempts to state a claim pursuant to 45 U.S.C. § 55, a provision of the FELA; Count II attempts to state an Illinois common law claim of retaliatory discharge in violation

of the public policy of the State of Illinois.[2] Monroe characterizes Count III as a request for punitive damages relief.

Union Pacific properly removed the action to federal court,[3] and shortly thereafter, filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion submitted that the district court lacked subject matter jurisdiction because the RLA preempted the claims as alleged. The motion also argued that Monroe failed to state an actionable claim for relief, in that Illinois law does not recognize a cause of action based upon the facts pleaded and § 5 of the FELA, 45 U.S.C. § 55, does not afford a private right of action for damages. The motion further established that even if § 55 afforded such a retaliatory discharge claim, the applicable three year statute of limitations barred the claim. The motion also asserted that Monroe should be judicially estopped from pursuing his retaliatory discharge claims due to his representation to the Public Law Board that the RLA grievance machinery provided his only avenue for relief. The district court found that the RLA pre-

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[2] As discussed throughout this brief, pursuant to Illinois law, "wrongful discharge" and "retaliatory discharge" are different theories of relief, but some opinions use the terms loosely. Briefly stated, a wrongful discharge claim is based on some type of contractual right to continued employment. *See Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987). The theory of retaliatory discharge claim is based upon the defendant's termination of the plaintiff for a reason defined by state law as unlawful or protected. Monroe often refers to the Count II claim as one for wrongful discharge in violation of public policy; Union Pacific construes this claim as a claim for retaliatory discharge. If Monroe bases his claim on any contractual right, such a claim is unquestionably preempted by the RLA. *Andrews v. Louisville Nashville R.R. Co.*, 406 U.S. 320 (1972).

[3] Union Pacific removed this case on the basis of diversity and federal question jurisdiction. Monroe did not file a motion to remand or otherwise challenge federal subject matter jurisdiction. Thus, the point of Section I of the Honorable Judge Fairchild's dissenting opinion is not clear. P.A., A-12 to A-13.

empted Monroe's claims, granted the motion to dismiss for lack of subject matter jurisdiction, and did not address the Rule 12(b)(6) portion of the motion. Monroe appealed.

By opinion dated June 10, 1997, the Seventh Circuit affirmed the dismissal of Monroe's Complaint due to RLA preemption, and did not decide the Rule 12(b)(6) arguments. The Seventh Circuit discussed at length this Court's decisions in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). Indeed, the great majority of the Seventh Circuit's opinion summarized and analyzed this Court's holdings, and reconciled its finding of RLA preemption with the decisions of this Court. The Seventh Circuit concluded that Monroe could not "artfully plead" around RLA preemption because the "factual particularities of [his] complaint" required RLA preemption. P.A., A-11. Judge Fairchild dissented from the majority's finding of RLA preemption on the ground that Monroe's claim did not assert a breach of the CBA.

REASONS FOR DENYING THE WRIT

As the Seventh Circuit opinion in this case makes clear, the Seventh Circuit fully considered and correctly decided the issues presented. The Seventh Circuit and the district court carefully analyzed the RLA preemption standard and found RLA preemption based upon the specific facts pleaded in Monroe's Complaint. Both the Seventh Circuit and the district court elaborated upon this Court's decisions in *Hawaiian Airlines* and *Lingle*, and determined that preemption of Monroe's claims was consistent with those decisions. The Seventh Circuit also analyzed decisions of other circuit courts of appeals, and its opinion is in accord with those from other circuits. Finally, the Seventh Circuit examined its prior decisions on RLA preemption, and distinguished the facts of this case from a case where it concluded the RLA did not preempt. It is Monroe who misconstrues the applicable RLA preemption standard, and urges this Court to adopt a standard which would permit any plaintiff to avoid federal preemption by merely stating that his claim implicates some right outside of the CBA. Thus, a writ of certiorari is clearly unwarranted because the Seventh Circuit correctly decided this case, in harmony with the decisions of this Court and the other circuits.

Monroe's petition for certiorari should also be denied for several other reasons. The Seventh Circuit's decision stands on its facts, just like every other circuit court of appeals opinion which is not reviewed by this Court. Monroe's argument that this decision will cause the "sky to fall" by requiring federal preemption of every wrongful discharge case asserted by a person subject to a CBA is baseless. In addition, review of the RLA preemption issues in this particular case would be futile because Monroe has not even stated an actionable claim for relief. No court has ever recognized the type of claims Monroe asserts. Not only would review prove futile, but this case does

not present important issues of law. Moreover, this case, Monroe's third legal proceeding to challenge his discharge, is of little or no importance to the parties, because Monroe has been reinstated to his job with full backpay and restoration of all other rights.

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT BASED UPON THE FACTS ALLEGED IN MONROE'S COMPLAINT, THE RAILWAY LABOR ACT PREEMPTED HIS CLAIMS, IN THAT THE ADJUDICATION OF HIS CLAIMS WOULD REQUIRE INTERPRETATION AND APPLICATION OF THE COLLECTIVE BARGAINING AGREEMENT AND BECAUSE HIS ARTFULLY PLEADED CLAIMS WERE NOT TRULY INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT

A. The Railway Labor Act Preemption Standard

In *Hawaiian Airlines*, this Court adopted the standard of preemption which governs the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, as articulated in *Lingle*, to govern claims of RLA preemption. 512 U.S. at 260-63. Two general principles arising out of *Hawaiian Airlines* govern RLA (and LMRA) preemption. First, the RLA preempts where the resolution of the claim depends upon the interpretation and application of a CBA. *See* 45 U.S.C. § 151(a); *Hawaiian Airlines*, 512 U.S. at 253. Second, the RLA does not preempt a cause of action which involves rights and obligations truly independent of the CBA. The RLA preempts all "minor disputes," and limits courts' subject matter jurisdiction to hear minor disputes to judicial review after the claimant has exhausted the appeal and arbitration procedures mandated by the RLA. 45 U.S.C. § 153(p) First; *Andrews*, 406 U.S. 320.

Thus, the first aspect of the preemption standard examines whether interpretation or application of the CBA is required. "[A] CBA is more than the sum of its parts. It comprises express provisions, industry standards, and 'norms that the parties have created but have omitted from the collective bargaining agreement's explicit language.'" *Fry v. Airline Pilots' Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996), *quoting Hawaiian Airlines*, 114 S.Ct. at 2250; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 215 (1985)("The assumption that the labor contract creates no implied rights is not one that state law may make."); *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 308 (1989)(CBA's "often incorporate express or implied terms that are designed to give management, or the union, a degree of freedom of action within a specified area of activity.") Therefore, the RLA preempts if resolution of the claim "depend[s] not only on a right found in the CBA's, but also if [it] implicate[s] practices, procedures, implied authority or codes of conduct that are part of the working relationship." *Fry*, 88 F.3d at 836.

To avoid RLA preemption, the plaintiff must also possess a specific right to the relief requested independent of the CBA. This Court has long recognized that a plaintiff cannot avoid preemption by merely labeling his claim as arising under state or federal law. *See Lueck*, 471 U.S. at 220 (Preemption "cannot vary with the name appended to a particular cause of action"). Thus, the fact that a claim is couched in terms of some right independent of the CBA is not dispositive. Not only must the theory of relief be truly independent of the CBA, but the facts that the plaintiff actually alleges and must ultimately prove to recover under this theory must also be independent of the CBA. *See id.; Fry*, 88 F.3d at 836-88 (Court rejected the plaintiffs' arguments that motive was the sole issue, and held that the state law conspiracy claims could be resolved only through interpretation and application of the CBA's which gave rise to the plaintiffs' claims); *Kollar v. United Transportation Union*, 83 F.2d 124, 126 (5th Cir. 1996).

B. The Seventh Circuit Correctly Applied The RLA Preemption Standard

The Seventh Circuit's opinion explained the preemption standard in great detail. P.A., A-4 to A-6. The court looked to the statutory language that minor disputes grow "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," (*quoting* 45 U.S.C. § 151a), and noted this Court's directive that minor disputes "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." P.A., A-4, A-5, *quoting Hawaiian Airlines*, 512 U.S. at 252-53 (additional citations omitted). The court then discussed the facts and holdings of *Hawaiian Airlines* and *Lingle*.

The Seventh Circuit next evaluated its own prior RLA preemption decisions in light of *Hawaiian Airlines* and *Lingle*. In *Bielicke v. Terminal R.R. Ass'n*, 30 F.3d 877 (7th Cir. 1994), the Seventh Circuit agreed with the district court that the RLA preempted a claim for injunctive relief pursuant to the FELA seeking to halt CBA disciplinary proceedings, where the plaintiffs contended that the defendant abused its CBA investigatory powers to discourage railroad employees from filing FELA injury suits. A few months later, in *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316 (7th Cir. 1994), the Seventh Circuit held that the RLA did not preempt a plaintiff's claim pursuant to the Illinois workers' compensation statute alleging that he was retaliated against for filing a workers' compensation claim.

After reviewing the applicable precedent, the Seventh Circuit stated that "[l]ike the district court, we agree that an uncritical glance at Monroe's claims seems to compel a finding of no preemption in light of the Supreme Court's *Hawaiian Airlines* and our *Sky Chefs* decisions." P.A., A-8. However, the Seventh Circuit correctly looked beyond the label attached to the claim and analyzed the language of the Complaint. Based on the

specific allegations in the Complaint, the Seventh Circuit concluded that adjudication of Monroe's wrongful discharge claims would require CBA interpretation to determine the validity of his claims. *Id.*

The Seventh Circuit identified five specific factors which compelled RLA preemption of Monroe's claims.[4] First, Monroe's Complaint specifically averred that Union Pacific did not avail itself of its CBA right to compel a physical evaluation to determine his physical condition. *Id.* Second, due to the particularities of the Complaint, a court would be required to apply and interpret various standards regarding employee fitness and job duties, which are implied CBA terms, to adjudicate his claims of pretext. *Id.* Third, Monroe challenged the propriety of the CBA disciplinary hearing and the sufficiency of evidence at that CBA hearing. *Id.* at A-9. Fourth, Monroe specifically alleged loss of promotions, seniority, benefits, and wages, which would require CBA interpretation.[5] Fifth, the court noted that Monroe argued to the Public Law Board in his grievance that his claim to challenge his dismissal was a minor dispute which must be decided through the grievance machinery and cannot be decided through a lawsuit.[6] *Id.* at A-9; App., A-10. Accord-

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[4] This stands in contrast to *Hawaiian Airlines*, where the employer's argument that the claim required CBA interpretation identified only the need to determine whether the employee was actually terminated as involving interpretation of the CBA. 512 U.S. at 266.

[5] The Seventh Circuit recognized the holding in *Livadas v. Bradshaw*, 512 U.S. 107, 124-26 (1994), that this reason alone does not support RLA preemption; however, courts may consider this factor. P.A., A-9 n.4.

[6] The court acknowledged that the existence of a grievance remedy does not require RLA preemption of a suit based on the same facts. P.A., A-9, n.5, *citing Hawaiian Airlines*, 512 U.S. at 258-64. However, the court was justified in relying on this as a factor supporting RLA preemption when Monroe himself represented to another tribunal that his discharge claim (pursuant to 45 U.S.C. § 55) was a minor dispute that must be remedied through the CBA and RLA grievance procedures. App., A-10.

ingly, the Seventh Circuit concluded that the "adjudication" of Monroe's discharge claims would require interpretation of the CBA, and the RLA therefore preempts those claims. P.A., A-10.

Contrary to Monroe's contentions, the Seventh Circuit did not hold in the present case that the RLA preempts all retaliatory discharge claims. Rather, the court examined the complaint presented, and correctly found that "[t]he factual particularities of Monroe's complaint, however, require an interpretation of the CBA and thus mandate our finding of preemption." *Id.* at A-11; *see Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992)("Plaintiffs can plead themselves out of court.")

The Seventh Circuit correctly recognized that Monroe could not "artfully plead" around RLA preemption. P.A., A-11. The court relied upon holdings from two other circuits in analyzing Monroe's attempt to recast preempted claims as not involving the CBA. In *Kollar*, 88 F.3d 124, the plaintiffs alleged that the defendant committed fraud by misrepresenting the seniority provisions of a CBA. The Fifth Circuit held that even though the plaintiffs couched their claim in terms of fraud, a state law claim independent of the CBA, adjudication of the fraud claim would require interpretation of the seniority provisions of the CBA. *Id.* at 126, *cited at* P.A., A-10. The Seventh Circuit also considered the Tenth Circuit's decision in *Fry*, where the plaintiffs alleged claims pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and various state law tort claims. P.A., A-11. 88 F.3d at 834. The gravamen of these claims was that the plaintiffs and their families were subject to harassment; a CBA provision prohibited such harassment. *Id.* The Tenth Circuit held that the RLA preempted because the plaintiffs' claims could not be understood without reference to the CBA, and that the claims could be resolved only through interpretation and application of the CBA. *Id.* at 836-37. Thus, the Seventh Circuit reconciled its decision with precedent from other circuits.

The RLA also preempts Monroe's claims because he lacks a specific right independent of the CBA to the relief requested. While the Seventh Circuit said that the "source" of his claims is independent of the CBA, P.A., A-8, the remainder of the opinion recognized that a plaintiff cannot avoid RLA preemption by merely invoking state law. This Court has consistently rejected such attempts to avoid preemption. *E.g., Lueck*, 471 U.S. at 220. Moreover, Monroe cannot avoid RLA preemption because the theories of relief he invoked do not afford him a legal right to the relief requested as a matter of law. *See* Sections I.C.2. and II.C., *infra*. The Seventh Circuit found RLA preemption due to the need to interpret the CBA, so it did not fully address the "independent right" issue. However, the court did state that it was "highly skeptical" that Monroe had even invoked a cognizable right. P.A., A-8. This skepticism was well-founded, as neither Illinois state law nor 45 U.S.C. § 55 confer a right of action upon Monroe. Monroe cannot avoid RLA preemption by asserting a non-existent claim or right as one which is "independent" of the CBA.

C. Monroe's Contentions Are Simply Incorrect, And Further Review Is Not Warranted

Monroe's arguments in support of certiorari rely upon misinterpretation of the RLA preemption standard, and misstatement and exaggeration of the scope and effect of the Seventh Circuit's holding. Contrary to Monroe's arguments, the decision below follows *Hawaiian Airlines* and *Lingle*, and does not state that the RLA preempts all claims of retaliatory or wrongful discharge.

1. Monroe Overlooks The Applicable Standard

Monroe essentially argues that *Hawaiian Airlines* stands for the proposition that as long as the CBA is not the only source of the right asserted by the plaintiff, the RLA does not preempt. *See* Brief, at 8, 10-13. Monroe attempts to demonstrate inconsis-

tency within the Seventh Circuit's opinion by relying upon the statement that the "source of [Monroe's] claims is independent of the CBA because they are found in the FELA and Illinois public policy." P.A., A-8. Monroe thus concludes that since he labeled his claims as state law retaliatory discharge and § 55 claims, the RLA cannot preempt. This argument is contrary to well-established principles of preemption. As discussed *supra*, the label a plaintiff attaches to his claims does not end the preemption inquiry. The Seventh Circuit correctly found that the RLA preempts Monroe's claims because they require interpretation of the CBA; this mandates preemption. If Monroe's logic is accepted, federal law could not preempt any claim as long as the plaintiff labeled his claim as grounded in some source other than the preemptive law at issue. Accordingly, Monroe's argument severely misconstrues this Court's teachings.

2. Monroe Cannot Escape Preemption Because He Holds No "Independent Right"

Another fundamental flaw in Monroe's argument against RLA preemption is that neither Illinois state law nor 45 U.S.C. § 55 confers upon him a claim for damages. Count I of Monroe's Complaint invokes § 55. Section 55 generally prohibits "devices" intended to exempt a railroad from FELA liability. No court has ever recognized the validity of a private cause of action based on § 55. No reported opinion has ever held that a plaintiff can collect damages for improper discipline or discharge through a private cause of action afforded under § 55. Several circuit courts of appeals have specifically rejected the contention that § 55 affords a claim for damages relief. *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1252 (5th Cir. 1986); *Landfried v. Terminal R.R. Ass'n of St. Louis*, 721 F.2d 254, 256 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1050-51 (7th Cir. 1983), *cert.*

denied, 465 U.S. 1007 (1984); *Bay v. Western Pacific R.R. Co.*, 595 F.2d 514, 516 (9th Cir. 1979).[7]

Thus, Monroe's contention in Section II of his Brief that the Seventh Circuit's holding is contrary to this Court's decision in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), is based upon an entirely false premise — that he can state a wrongful discharge claim under § 55. Monroe's arguments regarding *Buell* are also irrelevant because the claim in *Buell* was very different than the case at hand. The *Buell* Court determined that the RLA did not preempt an FELA negligence claim seeking recovery for personal injury pursuant to 45 U.S.C. § 51. The Seventh Circuit's decision does not create a "clear and irreconcilable" conflict with *Buell*, as Monroe contends, Brief, at 21, because Monroe does not allege a personal injury in the present litigation and § 55 does not create a claim for relief, and in any event, the opinion below does not state that it preempts all claims based on § 55.

Monroe also fails to invoke a cognizable "independent right" under state law. One of the subtitles of Monroe's Brief states that "[t]he Seventh Circuit's decision abrogated a valid claim by Monroe which the State of Illinois has long recognized." Brief, at 14. This plainly misrepresents Illinois law. As a matter of fact,

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[7] Courts have uniformly construed the Congressional intent underlying § 55 not to create a private cause of action. *See Jackson*, 717 F.2d at 1050-51 ("There is admittedly a superficial appeal to reasoning that the FELA . . . prohibits an employer from discharging an employee in retaliation for filing an FELA action. Such a statute has not, however, been enacted by Congress.") The most extensive discussion of § 55's legislative history is articulated in *Bay*, 595 F.2d at 516, where the court concluded that Congress' purpose "was to create a 'shield' against a railroad's defense that an employee had contracted away his right to sue the railroad for personal injuries and not to provide a 'sword' for a separate suit against the railroad."

no published Illinois decision recognizes a claim for discharge in retaliation for filing an FELA suit, as Monroe alleges. Illinois courts have rejected extremely similar attempts to expand the scope of the tort of retaliatory discharge. See discussion, at Section II.C.2.

In short, no court has ever permitted any plaintiff to assert a claim under either theory Monroe invokes, and the Seventh Circuit stated that it was "highly skeptical" that Monroe's claims could survive a Rule 12(b)(6) motion to dismiss. P.A., A-8. Thus, Monroe cannot avoid RLA preemption by relying on "independent rights" which do not exist.

3. Monroe's Reasoning Is Otherwise Deficient

Monroe's preemption analysis is deficient in several other respects. After correctly pointing out that mere reference to a CBA does not warrant preemption, Monroe argues, without citation (and understandably so) that "[t]o be preempted, the claim must be the product of a breach of a collective bargaining agreement. As long as the cause of action is not founded upon a breach of the collective bargaining agreement, reference to the collective bargaining agreement in resolving the claim does not preempt the claim." Brief, at 12. This is simply not the law.

Monroe also argues that the Seventh Circuit incorrectly found preemption where the reference to the CBA was incidental, in derogation of this Court's holdings. Brief, at 9. The Seventh Circuit analyzed this issue, and expressly rejected this argument. P.A., A-9 to A-11. The court found that the adjudication of Monroe's complaint would require more than mere consultation of the CBA; it would require interpretation of several different elements of the CBA. Accordingly, this Court should ignore Monroe's unfounded pleas that other courts will apply this decision to find that the RLA preempts any claim that involves incidental references to a CBA.

II. NOTWITHSTANDING THE SEVENTH CIRCUIT'S CORRECT DISPOSITION OF THE ISSUES PRESENTED, THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI FOR SEVERAL REASONS

A. The Decision Below Does Not Conflict With The Decisions Of This Court Or Other Circuit Courts of Appeals

The primary focus of Monroe's Brief is that the decision below conflicts with *Hawaiian Airlines* and *Lingle*. The court engaged in a lengthy analysis of both decisions, and then its own decision in *Sky Chefs*, which applied *Lingle* and *Hawaiian Airlines* to find that the RLA did not preempt a retaliatory discharge claim. Based on this analysis, the court specifically found that "[u]nlike the claims in *Hawaiian Airlines* and *Lingle*, Monroe's claims do not involve purely factual questions, and they do require interpretation of the CBA." P.A., A-8. Indeed, the Seventh Circuit dedicated most of the opinion to analyzing this Court's decisions and reconciling its finding of RLA preemption with those decisions. Monroe now seeks to create a conflict where none exists.

Likewise, the decision below does not conflict with *Buell*, as Monroe asserts. The *Buell* Court determined that the RLA did not preempt an FELA negligence claim seeking recovery for personal injury pursuant to 45 U.S.C. § 51. 480 U.S. 557. The Seventh Circuit's decision does not create a "clear and irreconcilable" conflict with *Buell*, as Monroe contends, Brief, at 21, because (1) Monroe does not allege a personal injury pursuant to § 51, as in *Buell*; (2) the opinion below does not state that it preempts any and all claims based on § 55; (3) and § 55 does not create a claim for damages in any event.

The Seventh Circuit's decision also does not conflict with those of other circuits. The Seventh Circuit correctly concluded that its "finding of preemption here complies with the recent

application of *Hawaiian Airlines* by two other circuits." P.A., A-8 to A-9, citing *Fry*, 88 F.3d 831 (10th Cir. 1996), and *Kollar*, 83 F.3d 124 (5th Cir. 1996). The opinion below noted that both *Fry* and *Kollar* found that the RLA preempted claims purportedly based on federal law and state tort law because the adjudication of those claims would require interpretation of the applicable CBA's. Each of these three decisions correctly applied *Hawaiian Airlines*.

Contrary to Monroe's allegation of a "conflict," the cases cited by Monroe simply found that the plaintiff's claims did not require any interpretation of the CBA and that the plaintiff possessed a right to the relief requested independent of the CBA, thereby rendering preemption inapplicable. *See Shafii v. British Airways, PLC*, 83 F.3d 566 (2d Cir. 1996)(Court found that the plaintiff asserted a right independent of the CBA, and that his claim could be decided "without looking into the CBA."); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995)(Court's lengthy analysis concluded that CBA interpretation was not required and disability discrimination statute was independent of CBA); *Taggart v. TransWorld Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994)(same); *Martin Marietta Corp. v. Maryland Comm. On Human Relations*, 38 F.3d 1392 (4th Cir. 1994)(same); *Gay v. Carlson*, 60 F.3d 83, 88 (2d Cir. 1995)(Court concluded "[n]o interpretation of the [CBA] is required to resolve these claims" arising under clearly actionable state tort law theories); *Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995)(same).

Like the Seventh Circuit in the present case, many circuit court of appeals decisions issued after *Hawaiian Airlines* have found RLA or LMRA preemption of claims pleaded under various federal and state law tort theories where the adjudication of those claims would require interpretation of the CBA or if the rights asserted were not truly independent of the CBA. *See Pilkington v. United Airlines, Inc.*, 112 F.3d 1532 (11th Cir. 1997)(RLA

preempted RICO and various state law tort and contract claims because adjudication of the claims would be intertwined with analysis of the CBA); *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245 (4th Cir. 1997)(LMRA preempted claim labeled as a wrongful discharge tort claim because it depended upon the CBA); *Stone v. Writer's Guild of America West, Inc.*, 101 F.3d 1312 (9th Cir. 1996)(LMRA preempted claims for fraud and intentional infliction of emotional distress because the adjudication of these claims was dependent on analysis of CBA); *Smith v. Houston Oilers, Inc.*, 87 F.3d 717, 721 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 510 (1996)(LMRA preempted claim of intentional infliction of emotional distress because adjudication of claim was "too dependent on an analysis of the CBA.")[8]

Hawaiian Airlines did not create a bright-line rule. Courts must still determine LMRA and RLA preemption on a case-by-case basis; the differences in the facts and rights asserted and theories of relief alleged will necessarily result in some decisions correctly finding preemption while others correctly deny it.

The Seventh Circuit has applied *Hawaiian Airlines* and *Lingle* to conclude that the LMRA or the RLA do not preempt state law claims. Indeed, just four days before the challenged decision was rendered, the Seventh Circuit issued its decision in *Schmidt v. Ameritech Corp.*, 115 F.3d 501 (7th Cir. 1997), reversing the district court's decision, and finding that the LMRA did not preempt an employee's state law tort claims. *See also Sky Chefs,*

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[8] The decisions in *Davis, Stone, Smith* (and *Kollar*), from the Fourth, Fifth, and Ninth Circuits, respectively, undercut Monroe's argument that the decision at issue " flatly conflicts with decisions from the Second, Fourth, Fifth, Eighth, and Ninth Circuits." Brief, at 10. Moreover, the Fifth Circuit's decisions in *Smith, Kollar* and *Hirras* further demonstrate that preemption depends upon the particular facts, and must be determined on an individualized basis.

35 F.3d 316. The Seventh Circuit's decisions properly and consistently apply the standards set forth by this Court; Monroe simply disagrees with the Seventh Circuit's conclusions.

B. The Seventh Circuit's Decision Stands On Its Facts

Monroe argues that "[e]ven where state and federal law claims invoke substantive rights independent of the CBA [and Monroe's claims do not], the Seventh Circuit's holding necessarily eliminates all state wrongful discharge claims for union employees in the railroad industry because one must refer to the CBA incidentally in each case." Brief, at 6. The decision below does not necessarily compel RLA preemption of all wrongful or retaliatory discharge claims. The court carefully stated that "[t]he factual particularities of Monroe's complaint, however, require an interpretation of the CBA and thus mandate our finding of preemption." P.A., A-11. The district court and the Seventh Circuit properly relied upon the specific allegations of Monroe's Complaint.

The decision below, like every other circuit court of appeals decision, stands on its facts. This Court does not sit to issue opinions which simply clarify or declare how a lower court's opinion should be applied in the future, or how one particular factual situation should be addressed. District and circuit courts will undoubtedly be required to apply the Seventh Circuit's opinion, as well as other decisions finding that the RLA does and does not preempt various types of claims on a case-by-case basis. This Court has previously instructed that courts must follow such an approach, stating that "[t]he full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Lueck*, 471 U.S. at 220. That is precisely what the lower courts have done in this case.

Indeed, throughout his Petition, Monroe overstates the effect of the Seventh Circuit's decision, ignoring the language of the

opinion in an attempt to attract this Court's attention. Monroe also argues that certiorari is warranted because every wrongful discharge claim within the Seventh Circuit will "encounter the argument that it is preempted because necessarily requires interpretation of the CBA." Brief, at 9. The Seventh Circuit and the district courts are fully capable of deciding the cases before them. Actually, in the challenged opinion, the Seventh Circuit discussed and reaffirmed the validity of its holding in *Sky Chefs*, 35 F.3d 316, which found that the RLA did not preempt a state law claim; the reaffirmation of *Westbrook* should assuage any fears that the Seventh Circuit applies preemption too expansively.

C. Further Review Would Be Futile Because Monroe Cannot State An Actionable Claim For Relief

Monroe fails to state an actionable claim for relief against Union Pacific for several reasons. Because the district court and the Seventh Circuit found RLA preemption, neither court addressed the Rule 12(b)(6) arguments, although the Seventh Circuit noted that it was "highly skeptical" that Monroe could state an actionable claim. P.A., A-8 n.3. This Court has stated that a writ of certiorari should not issue where the questions presented are merely "academic or episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Because Monroe cannot state a claim in any event, this Court should deny his petition for certiorari.

1. 45 U.S.C. § 55

No court has ever held that 45 U.S.C. § 55 creates a right of action to recover damages, for retaliatory discharge or any other wrong. *See* discussion, *supra*, at Section I.C.2. The primary remedial provision of the FELA, 45 U.S.C. § 51, permits the recovery of damages for personal injuries caused by the employing railroad's negligence, but does not permit a claim for retaliatory discharge. *Jackson*, 717 F.2d at 1050-51. No provi-

sion of the FELA forbids retaliatory discharge or provides a private cause of action for retaliatory discharge. *Id.* Under the ancient maxim of statutory construction, *expressio unius est exclusio alterius*, "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974). The specific inclusion of remedial provisions in §§ 51 and 59 and the omission of language in § 55 which forbids retaliatory or wrongful discharge or confers a right of action compels the conclusion that no such prohibition or right of action for damages exists. Monroe has not demonstrated that Congress intended to prohibit wrongful discharge or provide a remedy for it by enacting § 55. Moreover, even if § 55 permitted such a claim for retaliatory discharge, such a claim in this case is clearly barred by the three year statute of limitations applicable to FELA claims.[9] 45 U.S.C. § 56. As a result, Monroe cannot state a claim pursuant to § 55, and therefore this section does not confer an independent right which could potentially avoid RLA preemption.

2. Retaliatory Discharge

Illinois courts first recognized a claim for retaliatory discharge in *Kelsay v. Motorola*, 384 N.E.2d 353 (Ill. 1978), which created a limited exception to the employment at-will rule for persons terminated in retaliation for filing a workers' compensation claim. Illinois courts later extended the retaliatory discharge cause of action in favor of "whistleblowers." *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981). However, Illinois courts have steadfastly refused to expand the retaliatory discharge cause of action beyond the two narrow circumstances of retaliation for filing a workers' compensation

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[9] Monroe was terminated on December 17, 1992, and filed this suit on March 19, 1996.

claim and for certain types of "whistleblowing." *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 381 (7th Cir. 1992); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 925 (7th Cir. 1990); *Price v. Carmack Datsun, Inc.*, 485 N.E.2d 359 (Ill. 1985); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354 (Ill. 1985).

No reported Illinois decision has ever permitted a retaliatory discharge claim where a railroad terminated an employee to limit his FELA claim or in retaliation for filing an FELA claim. Monroe cites no such case.

Monroe assumes that he can state an actionable claim because Illinois affords a retaliatory discharge claim to persons who are retaliated against for filing a worker's compensation claim. However, outside of the worker's compensation laws, Illinois law does not afford a claim to persons who are retaliated against for seeking compensation for on-duty injuries. In fact, an Illinois court has rejected this precise argument. *Mitchell v. Deal*, 609 N.E.2d 378 (Ill. App. 1993). In *Mitchell*, the plaintiff farm laborer suffered severe on-duty injuries, and his employer was not subject to the Illinois workers' compensation law. *Id.* at 378-80. Shortly after the worker hired an attorney to pursue the injury claim, the defendants terminated his employment and evicted him from his home in retaliation for pursuing compensation. *Id.* at 379. The court held he could not state an actionable retaliatory discharge claim, even noting that "with the exception of Workers' Compensation coverage this case is indistinguishable from *Kelsay*." *Id.* at 380. Thus, an employee retaliated against for seeking compensation for work-related injuries can state a retaliatory discharge claim only if that claim is pursuant to the workers' compensation statute.

Even further, Monroe cannot state a retaliatory discharge claim under Illinois law in any event because he has not invoked a "public policy." Illinois law does not permit a retaliatory discharge cause of action where the dismissed employee filed a

lawsuit or otherwise pursued a legal claim against his employer (other than a worker's compensation claim), because the employee has not invoked a "public policy." *Buechele v. St. Mary's Hospital Decatur*, 509 N.E.2d 744 (Ill. App. 1987) (Court dismissed retaliatory discharge claim where the employee was discharged for filing a libel and slander suit against her employer); *Abrams v. Echlin Corp.*, 528 N.E.2d 429 (Ill. App. 1988) (Court dismissed retaliatory discharge claim where the employee was fired for threatening to take "necessary legal action to secure payment" of compensation); *Price*, 485 N.E.2d 359 (No retaliatory discharge claim where employee was fired after filing a claim under an employer-provided health insurance plan).

Illinois law also does not recognize the claim averred in Count II because Monroe has not invoked a "collective" or public right. A plaintiff cannot claim retaliatory discharge where the underlying claim was "one of private and individual grievance rather than one affecting our society." *Price*, 485 N.E.2d at 361; *see also Mitchell*, 609 N.E.2d at 380; *Abrams*, 528 N.E.2d at 435; *Buechele*, 509 N.E.2d at 747 ("The right to file a lawsuit claiming individual injury is purely a personal right and does not involve any clearly mandated public policy.") Because Monroe's claim is purely personal in nature and does not affect Illinois citizens collectively, he cannot state a retaliatory discharge claim.

Illinois courts have consistently refused to expand the scope of the retaliatory discharge claim beyond the two narrow circumstances recognized, even where employees have filed legal claims for work-related injuries (other than workers' compensation claims) against the employer. When facing an unresolved question of state law that could reasonably restrict or significantly enlarge liability, federal courts should choose the narrower path, at least until the state appellate courts hold differently. *Todd v. Societe BIC*, 21 F.3d 1402, 1412 (7th Cir. 1994).

Thus, this Court should not grant certiorari where a lower federal court would need to expand state common law to enable Monroe to state a right "independent" of the CBA and to state an actionable claim for relief.

3. Judicial Estoppel

Union Pacific and the lower courts are not the only ones to have labeled Monroe's termination claim a minor dispute which must be remedied under the RLA. In Monroe's grievance submission to the Public Law Board, the arbitral body authorized by the RLA, ardently argued that his retaliatory discharge must be assessed under the CBA and the RLA. App., A-10. Monroe asserted that:

> a claim against an employer for unmeritorious discipline whose purpose is to defeat or diminish rights under the FELA must be assessed under the collective bargaining agreement and the Railway Labor Act, rather than in a separate lawsuit under the FELA *Bielicke v. Terminal Railroad Association*, 30 F.3rd [sic] (7th Cir. 1994). Thus, this Board must determine this issue.

App., A-10 (emphasis added). Monroe asserts the converse position here, arguing that RLA preemption cannot apply. The same counsel represented Monroe in this action and before the Public Law Board. App., A-9. Because the lower courts found RLA preemption, they did not decide whether Monroe should be judicially estopped from pursuing this action.

Judicial estoppel is a flexible doctrine intended to "prevent the perversion of the judicial process." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). The doctrine should be applied where "self-contradiction is being used as a means of obtaining an unfair advantage" and to prevent litigants "from playing fast and loose with the courts." *Id., quoting Scarano v. Central Ry. Co.*,

203 F.2d 510, 513 (3d Cir. 1953). Thus, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he cannot later assume a contrary position to suit his needs. *Cassidy*, 892 F.2d at 641, *citing Davis v. Wakelee*, 156 U.S. 680, 689 (1895). The judicial estoppel doctrine applies to positions taken on legal issues, such as subject matter jurisdiction. *Cassidy*, 892 F.2d at 641-42. The doctrine also applies where a contrary position has been taken in earlier administrative proceedings. *Czajkowski v. City of Chicago*, 810 F.Supp. 1428, 1447 (N.D. Ill. 1992).

Throughout the RLA grievance and arbitration proceedings, Monroe specifically argued that his claim against Union Pacific for retaliatory discipline was a minor dispute which must be decided pursuant to the RLA. Indeed, before the Public Law Board, Monroe relied upon the *Bielicke* decision (30 F.3d 877) to argue that his claim was a minor dispute; before the lower courts, he argued that *Bielicke* was "bad law" which must be overruled.

Monroe prevailed on his grievance claim, securing reinstatement with all seniority rights unimpaired and $177,154.70 in backpay, which equals his wages from the date of his termination until his reinstatement (even though he earned wages in other non-railroad capacities during that time). Notably, Monroe filed this suit after the Public Law Board ordered him reinstated to work. Thus, Monroe argues that the same case law compels opposite conclusions, and he waited until after he procured relief from the Public Law Board to file this suit. This case demands the application of judicial estoppel, and the lower courts may well dismiss his claims on this ground if given the opportunity. Accordingly, this Court should deny Monroe's petition for certiorari.

D. The Issues Presented Are Not Important to the Public or the Parties

This Court "does not sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74. Because of the scarcity of resources and the immense number of petitions submitted, this Court properly limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.* at 79. The narrow issue of RLA preemption presented by Monroe's petition is not a question of importance to the public. Monroe argues that this case presents important issues because it necessarily eliminates retaliatory discharge lawsuits for railroad employees. Not only is this argument unsound, but the class of persons who could even potentially "encounter the argument" (Monroe's Brief, at 9) that the Seventh Circuit's decision requires preemption of their claims is small. The language of the challenged decision and contemporary subsequent decisions from the Seventh Circuit and other circuits clearly demonstrate that the courts of appeals are properly applying federal labor law preemption standards, and that the public has no interest in review of the issue.

Finally, not only is the narrow RLA preemption issue unimportant to the public, it is unimportant to the parties herein. Through the RLA grievance and appeal process, Monroe recovered $177,154.70, which represents all of his lost wages for the period when he was terminated. He has been reinstated to work, with his seniority rights unimpaired. Monroe has settled his claim against Union Pacific for personal injuries arising out of the July 20, 1992 incident. He is still prosecuting his suit in the Illinois state courts which alleges fraud and civil conspiracy against Union Pacific and the persons and entities who conducted surveillance. This petition for certiorari should be regarded as simply an attempt to expand this area of law in favor

of plaintiffs, or as simply another step in Monroe's repetitive and expensive campaign of litigation against Union Pacific.

CONCLUSION

For all of the reasons stated above, this Court should deny Monroe's petition for certiorari.

Respectfully submitted,

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October 9, 1997

APPENDIX

APPENDIX A

NO. 96-2862
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-351-PER
CLAY MONROE,
Plaintiff-Appellant,

v.

MISSOURI PACIFIC RAILROAD
COMPANY and UNION PACIFIC
RAILROAD COMPANY,
Defendants-Appellees

Appeal From The United States District Court, Southern
District Of Illinois, East St. Louis Division

The Honorable Paul E. Riley,
Presiding

Missouri Pacific Railroad Company And Union Pacific
Railroad Company's Motion To Supplement The Record

COME NOW Defendants-Appellees Missouri Pacific Railroad Company and Union Pacific Railroad Company, by and through their attorneys, and respectfully move this Court pursuant to Federal Rule of Appellate Procedure 10(e), for an order allowing Defendants-Appellees to supplement the record on appeal. In support of this Motion, Defendants-Appellees state as follows:

1. One of the arguments presented in Defendants-Appellees' Brief to this Court is that the district court's judgment may be affirmed because Plaintiff-Appellant Monroe should be judi-

cially estopped from pursuing this action by his argument before the Public Law Board that his claims of retaliatory discharge and a violation of § 55 of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, present a "minor dispute" under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. *See* Brief, at 17-21. The substance of this argument is that Plaintiff-Appellant should be judicially estopped from pursuing the retaliatory discharge and § 55 claims at issue in this lawsuit because he, with the assistance of his attorney in this action, adopted positions before the Public Law Board which are completely contradictory to several positions taken in this lawsuit, particularly as to the jurisdiction (or lack thereof) of courts to decide his claims. Brief, at 17-21.

2. The district court's July 9, 1996 order dismissing this lawsuit did not address the judicial estoppel argument because the lawsuit was dismissed in its entirety on other grounds. However, even though the district court did not address this argument, judicial estoppel alone could support affirmance of the judgment. *See* Matter of Cassidy, 892 F.2d 637 (7th Cir. 1990)

3. Plaintiff's Complaint and Defendants-Appellees' Brief each note that Monroe had achieved partial success before the Public Law Board in his grievance. Brief, at 20; Complaint, Counts I and II, ¶ 12 and Exhibit B thereto. At the time the Complaint and Brief were filed, Monroe had been ordered to return to work via an interim order by Public Law Board No. 5314, but his grievance claims for backpay and restoration of seniority rights were still pending. Brief, at 20.

4. By written order dated November 22, 1996, the arbitration panel in Public Law Board No. 5314 issued its final decision in the grievance filed by Plaintiff-Appellant Monroe. The November 22 order concluded that the disciplinary investigation against Monroe was not fair and impartial, and as a result, Monroe must

be "reinstated to service with all rights unimpaired and with backpay." Public Law Board No. 5314 order, at 1. This brief order requires that Defendants-Appellees pay Monroe backpay from the date of his discharge until the day he was ordered reinstated to work, and to restore all of Monroe's seniority rights as if he had never been disciplined. The total of the backpay award amounted to $177,153.40.

5. Thus, Monroe, through his counsel in this action, has successfully prosecuted a grievance which resulted in a complete backpay award and restoration of all rights. This award was secured through positions contradictory to those asserted in this lawsuit, which underscores that Monroe has attempted to pursue a suit and grievance, take contrasting positions as to the jurisdiction and power of each tribunal, and then pick the preferable result. Therefore, the order issued by Public Law Board No. 5314 and the facts that Monroe has received $177,153.40 in backpay and has had all previous rights restored is relevant to Defendants-Appellees' judicial estoppel argument.

6. Defendants-Appellees propose to add to the record before this Court a copy of the order from Public Law Board No. 5314 and a copy of the two separate checks[1] for Monroe's backpay. The proposed additions to the record are attached to this Motion.

7. Defendants-Appellees have timely presented the proposed additions to the record. Undersigned counsel first learned of the decision in Public Law Board No. 5314 via letter dated December 11, 1996.

WHEREFORE, Defendants-Appellees Missouri Pacific Railroad Company and Union Pacific Railroad Company respect-

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[1] Two separate checks were issued to Monroe due to limitations on the capabilities of Union Pacific's payroll department. The sum of the two checks is less than the total amount of the award because appropriate taxes were withheld.

fully request this Court to enter an order allowing Defendants-Appellees to supplement the record before this Court with the attached documents, and for such other relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, first class mail postage prepaid, this _____ day of December, 1996 to Mr. Jerome J. Schlichter, Schlichter, Bogard & Denton, 100 South 4th, Suite 900, St. Louis, MO 63102.

VERIFICATION

I, David Dick, hereby state under oath that the attached photocopies of the decision by Public Law Board No. 5314 and the two photocopies of the checks payable to Mr. Monroe are true and correct copies of the same.

_____

David Dick

APPENDIX B
PUBLIC LAW BOARD NO. 5314

AWARD NO.3
CASE NO.3

PARTIES TO DISPUTE:

United Transportation Union
- and -
Union Pacific Railroad Company

STATEMENT OF CLAIM:

Claim of Trainman C. E. Monroe for reinstatement to service with seniority rights and benefits unimpaired. Claim includes pay for time lost commencing with December 17, 1992, and thereafter until restored to full service.

FINDINGS:

This Public Law Board No. 5314 finds that the parties herein are Carrier and Employee, within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

The hearing officer's questions and false answers by the investigators employed by the Carrier were designed to make it appear that the surveillance was conducted in accordance with high professional standards and concern for the privacy of all parties, and that the investigation itself was therefore a fair and impartial one. The investigation was neither fair nor impartial. Accordingly this Board cannot consider the merits of this case in any respect. The Carrier did not conduct a fair and impartial investigation on December 8, 1992. Therefore the dismissal of the Claimant by letter dated December 17, 1992, which dismissal was based on the defective investigation held on December 8, 1992 must be set aside, and the Claimant must be reinstated to service with all rights unimpaired and with backpay. The

Carrier shall look to the Claimant's test period earnings for the twelve month period during which he last performed service immediately preceding the matter in question, and adjust this figure for any subsequent wage increases. Based on the record before us, we shall deem the Claimant able to return to work as of December 15, 1992. Also based on the record before this bound, the Claimant's Engine Service seniority shall place him at the 59th position on the C&EI seniority roster.

AWARD

Claim sustained

ORDER: The Carrier is required to comply with this award within thirty days. The Carrier has completed the interim award dated February 29, 1996.

_____

D. P. Twomey
Chairman and Neutral Member

_____ _____

Organization Member Carrier Member

DATED:_____

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

Case No. 96-CV-351-PER

CLAY E. MONROE,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
UNION PACIFIC RAILROAD COMPANY,
Defendants.

AFFIDAVIT

COMES NOW Catherine J. Andrews, and first being duly sworn and upon her oath, states:

1. I am at least 21 years of age and competent to make this Affidavit.

2. I am the Assistant Director of Labor Relations for the Union Pacific Railroad Company responsible for the appeal and arbitration of grievances concerning discipline imposed pursuant to the applicable collective bargaining agreement ("CBA"). As such, I am responsible for the appeal and arbitration of the grievance filed by the United Transportation Union ("UTU") on behalf of Clay E. Monroe. The procedures governing Monroe's grievance and appeal of the denial of that grievance are set forth in the CBA and the Railway Labor Act, 45 U.S.C. § 151 et seq.

3. Monroe is a member of the UTU, and is bound by the CBA between the UTU and the Railroads, relevant portions on discipline attached as Exhibit B.

4. Monroe's attorney in this civil action, Mr. Jerry Schlichter, appeared for the January 18, 1996 oral argument of Monroe's grievance before the Public Law Board. Mr. Schlichter also filed the "Organization Supplemental Submission To The National Railroad Adjustment Board" (attached as Exhibit D) in the pursuit of Monroe's grievance.

5. Mr. Monroe's grievance seeks recovery of backpay for time lost since December 17, 1992, reinstatement to service, restoration of any benefits and seniority rights, and removal of the discipline from his record.

_____

Catherine J. Andrews

On this ____ day of _____ 1996, personally appeared before me, to me known to be person described in and who executed the forgoing instrument, and acknowledged that she executed the same as her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

_____

Notary Public

My commission expires:

APPENDIX D

ORGANIZATION SUPPLEMENTAL SUBMISSION
TO THE
NATIONAL RAILROAD ADJUSTMENT BOARD

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
v.
UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM

Claim of Trainman C. E. Monroe for reinstatement to service with seniority rights and benefits unimpaired. Claim includes pay for the time lost commencing with December 17, 1992, and thereafter until restored to full service.

EMPLOYEE STATEMENT OF FACTS

Claimant, C. E. Monroe, was hired by the former Chicago & Eastern Illinois Railroad in train service on July 9, 1979. With the acquisition of that railroad by the Union Pacific, Claimant became an employee of the Union Pacific.

This dispute arises as a direct result of an injury sustained by Claimant on July 20, 1992. On that date Claimant was working as a Brakeman on Train NLCH. This train went on duty at Poplar Bluff, Missouri (M.P. 165.7), at 12:15 p.m. and was scheduled to operate to Salem, Illinois. The crew was stopped at Dexter (M.P. 189.9) to allow southbound CHDAZ to pass. At this point, the southbound train derailed and Claimant's train was thereby blocked and unable to proceed northbound.

(Pages 2-21 omitted; below are pages 22-23)

III. The Purpose and Effect of Carrier's Action Was to Circumvent Claimant's FELA Action and to Use the Limited Hearing to Eliminate His Claim for Wage Loss in the FELA Action

It has been held that a claim against an employer for unmeritorious discipline whose purpose is to defeat or diminish rights under the FELA must be assessed under the collective bargaining agreement and the Railway Labor Act, rather than in a separate lawsuit under the FELA. *Bielicke v. Terminal Railroad Association*, 30 F.3rd 877 (7th Cir. 1994). Thus, this Board must determine this issue.

It is readily apparent that the purpose of the Carrier's action as well as its effect was to obtain a great advantage in Claimant's Federal Employee Liability Act (FELA) claim by eliminating the wage loss element of his damages, thereby depriving him of the full remedy available. Chapter 45 U.S.C. § 55 provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

This prevents a railroad from escaping full liability for its employees' personal injuries, or usurping through any means the employee's right to sue for full damages under the FELA. *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979).

Here, Carrier was able to get Claimant fired in a controlled forum, thereby eliminating any claim for wage loss in this FELA action, in violation of the letter and spirit of 45 U.S.C. § 55. Further, rather than litigating the medical capability of Claimant in that action with the right of subpoena, discovery, and an independent fact finder, the Carrier improperly used the disciplinary process to eliminate the medical issue of Claimant's

ability to work from the FELA case where it rightfully belongs, again in violation of the above section. This is not the first time this Carrier has done this. It is known to the Organization that this technique has started to be used as a litigation strategy by this Carrier. To tolerate it will be to allow a complete subversion of the purpose of the grievance process and a virtual elimination of the remedy of claimant's claim for damages under the FELA. If allowed to stand, it will also open a floodgate of abuses as Carrier see that they can eliminate claims of wage loss and medical damage in FELA actions without ever subjecting their actions to the rigor of due process or an independent determination by an impartial fact finder. Such a result simply cannot be tolerated, and this Board must clearly so rule.